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# TUDOR AND EARLY-STUART STATUTES AND COMMISSIONS OF SEWERS

by

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A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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OF MASTER OF ARTS
IN

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "Tudor and Early-Stuart Statutes and Commissions of Sewers" submitted by Derek Campbell Drager in partial fulfilment of the requirements for the degree of Master of Arts in British History.

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# ABSTRACT

The great sewers statute of 1532 inaugurated an era of change for the commissions of sewers. A slowly awakening interest in the reclamation of drowned land prompted central authorities to confirm and expand the powers of commissions already well-rooted in customary practice, common law, and earlier statutes. This resulted in the evolution of the sewers commissions into administrative bodies more representative of government interests than those of the unique regions they had long sought to defend from aqueous and marine incursions. Until early in the seventeenth century these interests were most often aligned. Thereafter they began to clash, and the sewers commissions became embroiled in a controversy that was part of a greater one raging at the time. Questions about the rights of the people as opposed to those of government and king held common cause with many that were being raised by parliament, and thus in November 1641, the issue of the sewers commissions took its place in the Grand Remonstrance with others that have since been given more attention by historians.

# NOTE ON STYLE

In giving dates, the Julian calendar has been used, with the year beginning at 1 January. In quotations, the original spelling has been maintained. Throughout, in the use of upper and lower case, the system of the Cambridge University Press has been followed, save in the matter of quotations.

# ACKNOWLEDGEMENT

This thesis would not have been written but for the scholarly guidance and personal kindness of Professor W. J. Jones of the University of Alberta. As a teacher and historian he displayed a professional competence of the highest calibre, all the while maintaining a level of tolerance and patience far exceeding that normally expected of a thesis supervisor. His contribution will be long remembered and deeply appreciated.

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## LIST OF ABBREVIATIONS USED IN FOOTNOTES

| | |
|---|---|
| *APC* | *Acts of the Privy Council* |
| Callis | Callis, Robert. *The Reading of . . . upon the Statute . . . of Sewers*. |
| *Cal. Pat. Rolls* | *Calendar of the Patent Rolls of the Reign of . . .* . . . Henry III.<br>Edward I.<br>Henry VI.<br>Henry VII. |
| Coke, *4 Institute* | Coke, Edward. *The Fourth Part of the Laws of England Concerning the Jurisdiction of Courts*. |
| Co. Rep. | *The English Reports*. Vol. 77: *King's Bench Division 6 containing Coke, Parts 5 to 13*. |
| Cro. Jac. | *The English Reports*. Vol.79: *King's Bench Division 8 containing Croke, Jac.; Croke, Car.; and Popham*. |
| *CSP-Dom.* | *Calendar of State Papers, Domestic series, of the Reigns of Edward VI, Mary, Elizabeth and James I*. |
| *DNB* | *Dictionary of National Biography*. |
| *HMC Salisbury* | *Historical Manuscripts Commission*: Series 9. *Calendar of the manuscripts of the Most Honourable the Marquis of Salisbury, preserved at Hatfield House, Hertfordshire*. |
| Kirkus | Kirkus, Mary, ed. *The Records of the Commissioners of Sewers in the Parts of Holland, 1547-1603, Vol. 1*. |
| *L. and P. Hen. VIII* | *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*. |

| | |
|---|---|
| Moore, K. B. | *The English Reports*. Vol. 72: *King's Bench Division I containing Bellewe; Keilwey; and Moore*. |
| Owen | Owen, A. E. B., ed. *The Records of the Commissioners of Sewers in the Parts of Holland, 1547-1603, Vols. 2 and 3*. |

# INTRODUCTION

To the user of twentieth-century English, the word 'sewer' holds generally unpleasant connotations. It conjures up an image of Stygian darkness redolent with the odors of ordure, cylindrical home for rats the world over, and in New York City, for alligators. The same did not hold true for the meaning of the word in the seventeenth century.

An early English-French law dictionary submitted that "Sewers seems to be a Word compounded of two French Words, Seoir, to sit and Eau, Water".[1] Before that, Sir Edward Coke looked to the Latin word *suera*, the vulgar form of another Latin term which meant "when water doth issue". According to Coke, *suera* was the word for "a sewer, passage, channel, or guttur of water."[2] Giles Jacob continued in the same vein: "Sewer, . . . Is a Fresh-water Trench, or little River, encompass'd with Banks on both Sides, to carry the Water into the Sea, and thereby preserve the Land against Inundations".[3] Robert Callis' interpretation is perhaps the most accurate because he justified it by citing other statutes that, while not actually pronouncing on sewers commissions, established standards as to what constituted a sewer. He differed very little from Jacob in concluding that "the Sewer is a fresh water trench compassed in on both sides with a Bank, . . . it is a diminutive of a River".[1]

---

[1] Les Termes de la Ley (London: 1721 ed.), p. 541.

[2] Coke, 4 Institute, p. 275.

[3] Giles Jacob, A New Law Dictionary (London: 1724), s.v. "sewers".

In the thirteenth century there were some clearly understood principles of sewers practice, centred upon that area which had received the earliest and most notable treatment, Romney Marsh. A major step towards translating past experience into a national system was taken by the sewers statute of 1427, which in terms of length and detail was exceptional for its time. A basis was thus established on which the statute of 1532, the foundation of the early modern sewers commissions, and subsequent legislation could build.

The Tudors constructed a massive and complex machinery from great institutions to a variety of commissions, all to administer their comprehensive and paternal vision of common weal and state. The sewers commissions were one part of this mechanism, but their area of responsibility was of exceptional importance. Behind their essential function lay the possibility of not merely maintaining but recovering land, the reality of wealth. England was a rural and in many ways rustic society. Only one-twentieth of the population lived in urban surroundings, the vast majority of whom resided by 1600 in the London area. From 1540, perhaps earlier, the pressure of population upon land, and thus food production, was intense, and in years of harvest failure the results could be calamitous. Reclaiming land for agriculture not only met a pressing problem but promised the utmost profit to those who would control that land.

---

[1] Callis, p. 80.

Queries about the role of the sewers commissions in sixteenth and seventeenth-century English local government posed knotty problems for contemporaries. Differing views of the purpose and powers of the commissions were distorted by such elements as regional insularism, the anticipation of financial gain, and the preponderance of 'big government'.

Inaccuracies also abound in the observations made by those few who have assessed the commissions in retrospect. This is because the commissions of sewers *per se* have rarely been accorded full attention, but instead have usually been mentioned as evidence in support of other historical arguments. Professor R. W. Heinze, in his work on Tudor proclamations, suggested that his own field had been lacking in "a concerted effort to apply a study of the actual use of royal proclamations to an understanding of . . . statute."[1] If one were to substitute 'sewers commissions' where Professor Heinze has used 'royal proclamations' one would have a reasonable appraisal of current knowledge about the commissions.

Hence, much of the first part of this thesis will be devoted to the sewers statutes. Not only are they the primary sources of information about the commissions, but they were also the products of specific political and legislative environs. As such they can help to provide insight into the reasons behind the creation of the commissions. In order that the spirit of their law may be discerned, the sewers statutes will be examined in the latter light first. Then, the letter of their law--its relevance to the actual work of the sewers commissions and its effect when and where utilized--will be placed within the context of pre-Revolutionary England.

---

[1] R. W. Heinze, The Proclamations of the Tudor Kings (Cambridge: University Press, 1976), p. 165.

# CHAPTER I

## THE PRE-STATUTORY SEWERS COMMISSIONS

When searching for the genesis of the sewers commissions, it would appear at first glance, that one need go no further than the statute books. Indeed, that most learned and respected Restoration commentator, Sir Matthew Hale, classified the sewers commissions with those of charitable uses and others as courts that "have their original by . . . act of parliament."[1] Professor T. G. Barnes has followed suit by categorizing commissions of sewers with those other commissions which he deems to be "supplementary" to that of the peace--charitable uses and subsidies--on the basis that they were "strictly grounded on statutory authority".[2] Undeniably, the massive weight brought to bear on the matter by the great sewers statute of 1532 leaves little doubt that this is the source from which subsequent sewers commissions drew most of their authority. However, this statute contained a clause empowering commissioners of sewers "to make and ordeyne statutes ordenaunces and provysions . . . after the lawes and customes of Romney marsshe in the Countie of Kent".[3] Furthermore, a reference to these same "lawes and customes of Romney marsshe" appears in the very first statute for sewers commissions in 1427.[1] Obviously, there was a *modus operandi* for dealing with the problems of inundation and land drainage which pre-dated that set out by any sewers statute.

---

[1] Sir Matthew Hale, The Prerogatives of the King, ed. D. E. C. Yale (London: Selden Society, 1976), p. 184.

[2] T. G. Barnes, Somerset, 1625-1640: A County's Government During the "Personal Rule" (Cambridge, Mass.: Harvard University Press, 1961), p. 146.

[3] 23 Hen. VIII, c.5.

The origins of the laws and customs of Romney Marsh are obscure, yet all accounts agree that they were the oldest and most widely known code of land drainage in England. As early as the thirty-fifth regnal year of Henry III (ending 28 October, 1251) they were being referred to as "antient and approved Customes".[2] By the fourteenth century, their usage had become standard in many parts of England afflicted by flooding,[3] even though there were other regions that had their own well-constituted ways of dealing with such problems.[4] Nevertheless, in 1662, Sir William Dugdale could only admit that he had "yet to learn, when and by whom [the laws and customs of Romney Marsh] were first framed and composed".[5]

The foundation for the system which protected Romney Marsh from the sea was the group of twenty-four Marsh jurats, "elected and sworn for that purpose" since "time out of mind".[1] Some idea of the procedure they followed can be gained from the ordinances of Henry de Bathe, a prominent justice of the first half of the thirteenth century. In 1257, Henry III dispatched him to resolve a conflict that had arisen over the methods used for the defence of the Marsh against inundation. At the request of the Marsh council, de Bathe recorded a set of regulations governing the conduct of the aforementioned business.[2] It is reasonable to assume that he would pay due respect to local tradition and that his ordinances were, in fact, both a clarification and a fair representation of the laws and customs of Romney Marsh.

---

[1] 6 Hen. VI, c.5. Mention has been made of a pre-1427 statute dealing with sewers in John H. Evans, "Archaeological Horizons in the North Kent Marshes," Archaeologia Cantiana 66 (1954):144, but as Robert Callis correctly asserted, the 1427 statute was the first "wherein the frame of a Commission of Sewers is set down". Callis, p. 24.

[2] William Dugdale, The History of Imbanking and Drayning of Divers Fenns and Marshes . . . (London: Alice Warren, 1662), p. 17.

[3] H. G. Richardson, "The Early History of Commissions of Sewers," English Historical Review 34(1919):391.

[4] In 1285, a commission to the bishop of Ely and Hugh Pecche, concerned with sewers in the county of Cambridge, referred to the "custom of the Fen". Cal. Pat. Rolls, 1281-92, p. 203.

[5] Dugdale, History of Imbanking, p. 17.

Rendered into simplest form, de Bathe's code required a twelve-man jury to determine what was necessary for Marsh defences in the way of maintenance or improvement. The twenty-four jurats were to act on the jury's decisions by apportioning an amount for each inhabitant to contribute towards the work, based on the quantity of his holdings and his potential loss in case of flooding. Anyone neglecting to contribute or make the repairs demanded of them could be distrained by the jurats. The ordinances of Henry de Bathe made it clear that the jurats bore ultimate responsibility for the preservation of all lands within the Marsh, and that this was in accordance with time-honoured practice.[1]

---

[1] Dugdale, History of Imbanking, p. 18; Sidney Webb and Beatrice Webb, English Local Government, vol. 4: Statutory Authorities for Special Purposes (London: Frank Cass and Co., 1922), p. 17.

[2] Dugdale, History of Imbanking, pp. 18-19.

Although the jurats were the supreme local authority, they were not alone in their concern for Romney Marsh. There is evidence dating back to the twelfth century that the archbishops of Canterbury sponsored the 'inning' or draining of parts of the Marsh.[2] In addition, the king's interest applied to all parts of the realm that were subject to inundation by fresh or salt water. Royal participation in the administration of defence efforts in such areas was manifest in the granting of letters patent and the issuing of commissions. For example, in 1257 letters patent of Henry III confirmed the power of the Romney Marsh jurats to distrain citizens for the repair of sewers.[3] As for the use of commissions, Sir Anthony Fitzherbert provided some light on the subject. In 1534, he wrote of the king's responsibility for the safeguarding of "his kingdom . . . against the sea", this to be exercised through the commission of *oyer* and *terminer*.[4] Fitzherbert's remarks were given added strength a century later when Robert Callis maintained that the commission of *oyer* and *terminer* was the cradle out of which the sewers commissions evolved. It was in the records of this commission that he found what he believed to be some of the earliest writs relating to sewers.[1]

---

[1] Dugdale, History of Imbanking, pp. 19-20.

[2] Grevile M. Livett, "Lydd Church," Archaeologia Cantiana 42(1930):91.

[3] Cal. Pat. Rolls, 1247-58, p. 592.

[4] Sir Anthony Fitzherbert, The New Natura Brevium, 9th ed. (Dublin: H. Watts, 1793), p. 258.

The commissions of *oyer* and *terminer* "empowered the judges of assize to take criminal business", although in the thirteenth century they could still be granted simply to "persons of weight and influence in the county".[2] Directing the holder to "inquire, hear and determine", they were created to deal with crime at the local level and had to work in conjunction with both the grand and petty juries. Some were of a general nature, capable of handling "all treasons, felonies and misdemesnors", but there were also special commissions of *oyer* and *terminer* issued "upon urgent occasions".[3] It is most likely that those dealing with sewers fell into the latter group. For example, when Henry de Bathe was sent to Romney Marsh in 1257, he was commissioned to "hear and determine the controversies . . . risen betwixt the said Jurats and the Marsh-men".[4] The urgency of the occasion for which this commission was issued is signified by the fact that Henry de Bathe was chosen to carry it. Although he had been charged with extortion and accepting bribes in 1250, he had regained royal favour in 1253, and his long and otherwise distinguished career had brought him to a senior position on the bench of the common pleas. He presided over numerous commissions of assize,[5] and in pursuit of judicial duties his name was often mentioned in concert with that of Henry III's great justiciar, Hugh Bigod.[1]

---

[1] Callis, p. 24.

[2] William S. Holdsworth, A History of English Law (London: Methuen & Co., 1903), 1:119-21.

[3] Sir William Blackstone, Commentaries on the Laws of England, ed. Sir Joseph Chitty (London: William Walker, 1826), 4:269-71.

[4] Dugdale, History of Imbanking, p. 18.

[5] DNB, 1:1322.

As one of the central justices that comprised the elite of the judiciary, Henry de Bathe was part of a group totalling no more than seven or eight, a group that was staggering under the weight of the ever-increasing volume of English legal business in the thirteenth century. The assignment of special commissions to local gentry was a tactic designed to relieve some of the pressure on the royal judges,[2] yet in the case of Romney Marsh it was to one of the latter that the special commission was given. This must be interpreted as a reluctance on the king's part to leave the solution of an important and sensitive problem to untrained amateurs when he could send a respected professional to deal with the matter. Questions concerning sewers clearly held the full attention of the central government. They were to continue in such a position for centuries to come.

Henry de Bathe's commission for Romney Marsh reveals an interesting characteristic when compared with one issued to him the following year. In the first instance, his assignment was two-fold: not only was he to "hear and determine" the dispute between the jurats and the men of the Marsh; he was also to provide for the defence and repair of the Marsh.[3] He came as an objective outsider hoping to solve internecine quarrels, but with the preservation of the Marsh lands as his ultimate goal. In contrast to this 'bi-focal' type of commission was one of a more singular purpose. It was dated February 7, 1258, and appointed de Bathe to aid the sheriff of Lincoln in distraining "all persons having lands and tenements who ought to repair and keep up the dikes, bridges and walls of the sea and marsh there".

---

[1] Sir Paul Vinogradoff, ed., Oxford Studies in Social and Legal History (Oxford: Clarendon Press, 1925), vol 8: Studies in the Period of Baronial Reform and Rebellion, 1258-1267, by E. F. Jacob, pp. 41 n. 2, 94 n. 2.

[2] John P. Dawson, A History of Lay Judges (Cambridge, Mass.: Harvard University Press, 1960), p. 130.

[3] Cal. Pat. Rolls, 1247-58, p. 592.

In this case, de Bathe was removed from the role of impartial arbiter ruling on a dispute between two parties, and placed squarely on the side of local officaldom. There was no command to 'hear and determine'. Instead, he was simply enjoined to "provide and ordain with the said sheriff" that the necessary steps were taken to protect the area from inundation.[1] There were two of these 'singular' commissions issued in the same year to Nicholas de Haudlo, both pertinent to Romney Marsh.[2] Thus, the inchoate nature of the embryonic sewers commissions, at least with regard to exact function, becomes apparent. A look at the ensuing half-century further complicates the subject, especially in the case of nomenclature.

Not long after the time of Henry de Bathe and Nicholas de Haudlo, a new appellation appeared in the patent rolls (if we can trust the Calendar) for those commissions issued in the matter of sewers. During the opening years of the reign of Edward I they came to be known as commissions "de walliis et fossatis",[3] roughly translated from the

---

[1] Cal. Pat. Rolls, 1247-58, p. 660.

[2] Ibid., pp. 635, 662.

[3] Ibid., 1272-81, pp. 120, 291, 380.

Latin to mean 'walls and ditches'. The commissions *de walliis et fossatis* appear to be similar to that issued to Henry de Bathe for Lincoln in 1258. In the earliest one to be found in the Calendar, dated 4 June, 1275, there is no clause reading 'to hear and determine', only an order to descry and then distrain those who should pay for the protection of land from inundation in Holland, Lincolnshire.[1] From this point on, many of the commissions include no instructions but merely specify the area with which they were concerned. This could well be due to the establishment of a standardized name for the commissions and the implications inherent in the title by way of precedent.

While this title was to be the principal one in use for many years to come, it did not preclude the presence of other terminology in the language of the commissions, particularly in the latter years of the thirteenth century. For instance, in 1292 a letter directed to the sheriff of Essex empowered him to distrain (for the repair of the marshes of West Ham) with the simple words, "Mandate to the sheriff of Essex".[2] Also, the title of *oyer* and *terminer* continued to appear at the head of what were, in effect, sewers commissions. A series of these were issued apposite to a continuing agitation in Marshland, Norfolk. Some were two-pronged, like the one originally given to Henry de Bathe;[1] others simply involved the handing down of judgment with no actual work on sewers included.[2] What they all had in common, both those in Norfolk and a different one in Kent,[3] was their affiliation with cases in which a felony had been committed, in each instance the repeated destruction of a dike by malcontents. It seems that a general trend was being established whereby a commission was entitled *de walliis et fossatis* if it was concerned directly with sewers and their maintenance or construction; if on the other hand it concerned disputes or crimes in connection with sewers it was termed a commission of *oyer* and *terminer*.

---

[1] Cal. Pat Rolls, 1272-81, p. 120.

[2] Ibid., 1281-92, pp. 513-14. Other examples read "Commission . . . to decide whether it would be to the advantage of the said inhabitants to repair the said old dike of Rughmere . . ." and "Commission . . . to enquire touching a complaint . . . with power to remove and entirely displace the said bank and sluice". Ibid., pp. 203, 404.

Further light is shed on this question by close examination of the two-part commission of 19 June, 1293, issued to Peter de Campania, Thomas de Hakford, and Adam de Shorpham for the region of Marshland in Norfolk. It reads:

> Commission of oyer and terminer to Peter de Campania [*et al.*] . . . touching the persons who perforated the dyke called Pokediche . . . ; and to go to Utwell and take measures that the waters descending by that town have their old and accustomed course to the sea . . . .[4]

The two distinct sections of this commission become important in view of a later one (1297), also for Utwell in Marshland, which refers to that of 1293:

> . . . touching the persons who by night broke the obstructions recently erected in pursuance of a commission de walliis et fossatis, directed to Peter de Campania, Thomas de Hakford and Adam de Shorpham . . . .[5]

---

[1] Cal. Pat. Rolls, 1292-1301, pp. 24, 287.

[2] Ibid., pp. 218, 257. [3] Ibid., p. 257. [4] Ibid., p. 24.

[5] Ibid., p. 287.

One of two conclusions can be reached from this evidence: either the titles were interchangeable and were used indiscriminately; or the commission of 1293 was a combination of both *oyer* and *terminer* and *de walliis et fossatis*, from which it would follow that the 1297 commission was alluding to only the second part of that of 1293. It should be noted that in 1297 no mention whatsoever was made about delivering judgment on the felonious dike-breakers. The reference was specifically to "obstructions" (*i.e.* new dikes) erected by Campania and his colleagues, thus covering strictly the *de walliis et fossatis* part of the commission. Considering the foregoing together with the discernible differences between the other 'singular' commissions of each title, it seems possible that by the onset of the fourteenth century, the appellations of *oyer* and *terminer* and *de walliis et fossatis* had taken on separate meanings in the jurisdiction of sewers.

The word 'sewers' itself began to appear in official form in the first half of the fifteenth century, but only in connection with justices. Indirect allusions to "justices of sewers" can be found in grants of exemption given either to individuals or to an institution such as an abbey.[1] However, the Calendar of Patent Rolls persists in the use of the *de walliis et fossatis* label beyond 1427, (the year of the first sewers statute) and until the end of the reign of Henry VII. There are commissions entered *de walliis et fossatis* as late as 1 January, 1509,[2] at which time the Calendar switches to modern nomenclature. Henry VIII ascended the throne in April, and in the Letters and Papers numerous commissions of sewers are listed as such, some dated as early as the summer of 1509.[1] From this point on, with help soon forthcoming from the 1532 statute, the sewers commissions would carry their own name, jurisdiction, and firmly fixed identity into the seventeenth century. Only Sir Anthony Fitzherbert still included them with the commissions of *oyer* and *terminer*. Seventeenth-century legal opinion, as represented by Sir Edward Coke, removed the last vestiges of doubt as to their distinct nature. In the fourth part of his Institutes, Coke awarded the sewers commissions their own individual chapter, separate from the one on *oyer* and *terminer*.[2]

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[1] Calendar of the Charter Rolls preserved in the Public Record Office (London: Her Majesty's Stationery Office, 1927), 1427-1516, p. 96; Cal. Pat. Rolls, 1429-36, pp. 204, 462.

[2] Cal. Pat. Rolls, 1494-1509, p. 618.

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[1] L. and P. Hen. VIII, 1-pt. 1:51, 64, 82.

[2] Coke, 4 Institute, pp. 275-77.

# CHAPTER II

# THE EARLY SEWERS STATUTES

The sewers commissions can be traced back to both local custom and the royal government's conduct of business by special commission. However, the legal foundation upon which they were established was provided by the statutes. These are eleven in number and were enacted over a period of one hundred and forty-four years, beginning in 1427 and ending in 1571. In the early-Stuart period, the political failure of parliaments reduced the opportunity for amendment in this as in so many other cases.

Although there is a short reference in the *Confirmatio Cartarum* of 1297 to "bridges and banks", and to the distraining of persons for their construction and maintenance,[1] 6 Hen. VI, c.5 (1427) was the first statute of sewers. Dr. J. H. Clapham believed that it furnished, through the commissions of sewers, a "central machinery of compulsion" for the defence and repair of marshes.[2] Professor H. G. Richardson took exception to this on the grounds that such machinery already existed in the form of those *ad hoc* commissions (so entitled by Professor H. C. Darby)[3] that had been in use since the mid-thirteenth century. Then, citing Sir William Dugdale, he suggested for the sake of argument that the 1427 act may have been primarily intended to apply the laws and customs of Romney Marsh to the rest of the country.[1] Although Professor Richardson proceeded in his deductive exercise to overrule this possibility,[2] his interpretation of Dugdale deserves some comment, if only to exonerate the latter from implicit charges of historical unreliability.

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[1] 25 Edw. I, c.15.

[2] J. H. Clapham, review of Public Works in Medieval Law, by C. T. Flower, in English Historical Review 33(1918):107.

[3] H. C. Darby, The Medieval Fenland (Cambridge: University Press, 1940), p. 163.

The quotation which Professor Richardson made use of appears in Dugdale's chapter on Romney Marsh, the central theme of which is the venerability of the local laws and customs. When the queried passage is taken in context, it is not difficult to see the line of reasoning Dugdale was following. He was ending his expository chronology with the fact of the incorporation of the laws and customs of Romney Marsh into the 1427 act, and using this fact as triumphant, conclusive proof of the widespread adherence these laws had gained over the centuries.[3] It is somewhat tendentious to infer from this that Dugdale believed the statute to have been solely a vehicle for the nation-wide application of the laws and customs of Romney Marsh. On the other hand, Professor Richardson, albeit misinterpreting Dugdale, was correct in asserting that a major effect of the statute was to make a standard out of the Romney Marsh laws.[4] As for its

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[1] Richardson, "Early History," p. 391. [2] Ibid., p. 392.

[3] Dugdale, History of Imbanking, pp. 16-35.

[4] Richardson, "Early History," p. 392. There is provision within the statute for the making of ordinances by commissioners according to the laws and custom of Romney Marsh. 6 Hen. VI, c.5.

*raison d'etre*, the former conceded that only speculation was possible.[1] This cannot be denied, but perhaps a return to Dr. Clapham's theory of a 'central machinery of compulsion', and a look at the wording of the statute, will make for slightly less conjecture.

Although Professor Richardson's objections to Dr. Clapham's phrase centered on the word 'machinery', (and they must stand as valid considering their *a fortiori* proof) the key here is the word 'central'. Keeping in mind the *ad hoc* nature of pre-1427 efforts to deal with problems of inundation, one can detect in the statute's preamble the implication that these efforts were not satisfactory. This is accompanied by an explicit declaration of the necessity for a solution to the problem.

> ITEM, Our Sovereign Lord the King, . . . considering the great Damage and Losses which now late be happened by the great Inundation of Waters in divers Parts of the Realm, and that much greater Damage is very likely to ensue, if Remedy be not speedily provided . . . .[2]

This statement, when coupled with another recognizing the crown's responsibility in the matter,[3] gives evidence of a sense of need on the part of the government for a proclaimed policy issued by a 'central' authority. In this manner, added force and direction could be given to the 'machinery' which already existed. The fulfilment of this need could well have been the major reason for the passing of the statute. Professor Darby's conclusion that, apart from "making de jure what had been de facto, the purpose of the statue is obscure",[1] seems to disparage such a basis for its enactment. However, the clarification and offical pronouncement of government policy in this instance cannot be considered frivolous or superficial. Robert Callis advised that the act of 1427 was "a worthy Law",[2] which performed a valuable service for the embryonic sewers commissions by giving them "some more power and strength thereto than was before, having backt them with the power of the Parliament."[3]

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[1] Richardson, "Early History," p. 392.

[2] 6 Hen. VI, c.5.

[3] Ibid. "We, Forasmuch as by reason of our regal dignity We be bounden to have Regard to the Safety of our Realm of England in all Places, willing in this behalf to provide convenient and speedy Remedy . . . ".

The validity of Callis' assessment stands reinforced upon examination of the statute within its context. When viewed against the background of the early parliaments of Henry VI, the 1427 act towers like a Gulliver over a legislative world of Lilliputian dimensions.

The accession of Henry VI in 1422 inaugurated a turbulent minority. Henry V had died in France on August 31, bequeathing to England a nine-month old son and a will that was open to interpretation. The ensuing power struggle pitted the boy's uncle, Humphrey, duke of Gloucester, against the rest of the minority council. Gloucester claimed the protectorship over the young king and believed the council to have acceded to his desires in 1422.[4] However, in the passage of time the practice of the council did not conform with

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[1] Darby, Medieval Fenland, p. 164.

[2] Callis, p. 95. [3] Ibid., pp. 24-25.

[4] J. S. Roskell, "The Office and Dignity of Protector of England," English Historical Review 68(1953):216.

Gloucester's own conception of his status. His misgivings about the security of his position increased to the point where he chose the second session of the 1427-28 parliament to make a stand. On 3 March, 1428, he refused to enter the house of Lords until he was given a conclusive definition of his powers as protector.[1] Thus, the setting for the final act of a major political drama happened to be the parliament which also produced the first sewers statute. It was one of six convened during the first eight years of the reign of Henry VI and as such shared that quality of frequency common to medieval parliaments.[2]

Compared to the revolutionary Reformation Parliament (1529-1536) all six were short-lived, but three were substantially longer than both the average parliament during the reign of Henry VI, (1422-1471) and many Tudor parliaments as well.[3] Although not too much should be made of exceptions, these three parliaments and their legislation must be noted if excessive claims for Tudor parliaments and legislation are to be avoided. As one would expect, the former were more prolific in legislation than their lesser cousins of the same decade. While the three short parliaments of the 1420s only yielded sixteen statutes between them, two of the lengthier ones passed a total of fifty.[1] However, the same did not hold true for the third of the longer assemblies.

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[1] E. F. Jacob, The Fifteenth Century, 1399-1485 (Oxford: Clarendon Press, 1961), pp. 232-33.

[2] J. S. Roskell, "Perspectives in English Parliamentary History," Historical Studies of the English Parliament, ed. E. B. Fryde and Edward Miller (Cambridge: University Press, 1970), 2:303-4.

[3] Sir F. Maurice Powicke and E. B. Fryde, eds., Handbook of British Chronology, 2nd ed. (London: Royal Historical Society, 1961), pp. 530-31; C. R. Cheney, ed., Handbook of Dates for Students of English History (London: Royal Historical Society, 1945), tables 6, 10, 14, 18, 22, 26, 30; Roskell, "English Parliamentary History," p. 305.

This parliament, so distinctive from the rest, was summoned for 13 October, 1427, and dissolved on 25 March, 1428. It had two sessions which sat for a total of one hundred and fifteen days.[2] Although this time span matches fairly closely those of the other two longer parliaments and exceeds that of the average for Henry VI by nearly a month,[3] the 1427 parliament managed to produce only six statutes. This may well have been due to the unsettled political situation. The spectacle of a prince of the blood and the great magnates of the land vying for ascendancy over a boy king must have diverted attention from the more mundane daily business of government. Hence, the six statutes that were created, including the first sewers act, must take on considerable significance. When 'great issues' absorbed the attention and energies of the 1427 legislators, the matter of sewers was one of the very few they found time to deal with.

Even more indicative of its importance is the length of the sewers statute. It occupies almost two pages in the statute book, and except for another act of 1427 dealing with the wages of artificers[4] that runs to one and a half pages in The Statutes of the Realm, it dwarfs any passed in the previous parliaments of Henry VI. A devotion to detail is shown which anticipates the greater depth and comprehensiveness of sixteenth-century statutes. The main body of the statute features the format of an actual sewers commission, and the specificity of instructions contained therein underscores the difference of its nature from other acts passed by the early parliaments of Henry VI.

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[1] Statutes of the Realm, ed. T. E. Tomlins *et al.* (London: Dawsons, 1810), 2:passim.

[2] Powicke and Fryde, Handbook, p. 530.

[3] Roskell, "English Parliamentary History," p. 305.

[4] 6 Hen. VI, c.3.

Another salient point to consider is the timespan for which the statute was to endure. In the parliaments of 1425, 1426, and 1427 a total of sixteen statutes were passed: ten of them had no fixed duration;[1] one was to survive in perpetuity;[2] two were valid until the next parliament;[3] one was valid three years;[4] and one was to stand at the king's pleasure.[5] The sewers act, on the other hand, was granted a life of ten years.[6] As with many statutes of the time, it was put forward "at the special Instance and Request of the Commons".[7] Responses to house of Commons petitions by the king and house of Lords were frequently tempered by amendments, which often took the form of a limitation of the duration of the statute.[8] In discussing the period from 1422 to 1451, Professor H. L. Gray could not determine whether Commons assent to these amendments was sought, but he suggested that indeed the king and Lords would have acted "independent of their approval".[1] The sewers statute seems to bear him out on this point, for it was enacted by the "Advice and Assent of the Lords Spiritual and Temporal", but apparently not of the Commons.[2] The application of the ten year limit to the statute was probably an amendment made in response to a petition by the Commons, but without the draft being referred back to them.

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[1] 3 Hen. VI, c.1-c.5; 4 Hen. VI, c.4, c.5; 6 Hen. VI, c.2, c.4, c.6.

[2] 4 Hen. VI, c.3. [3] 6 Hen. VI, c.3; 4 Hen. VI, c.1.

[4] 4 Hen. VI, c.2. [5] 6 Hen. VI, c.1. [6] 6 Hen. VI, c.5.

[7] Statutes of the Realm, 2:232.

[8] H. L. Gray, The Influence of the Commons on Early Legislation (Cambridge, Mass.: Harvard University Press, 1932), p. 282.

It is understandable that, as a somewhat experimental device, the 1427 act would not be allowed an indefinite tenure. Nevertheless, it was given the lengthiest of those terms normally allotted to limited statutes,[3] making it the senior survivor of the five mid-1420s acts in that category. Ten years could have been thought of as the ideal probationary period for the sewers statute. Although it embodied a trial idea, it was still of a nature crucial enough for the government to award it the force and stability associated with semi-permanence. It seems that Robert Callis' "worthy Law" may have been thought of and treated as such long before it was entitled so by him.

Although it was to endure for almost a century, the 1427 act did not stand unchallenged. Evidently the parliamentary potency which so impressed Robert Callis did not carry the same weight with some of his fifteenth-century predecessors. In 1429, another sewers statute was passed in what appears to have been an attempt to plug loopholes left in the first one.[1] It is difficult to discern the exact reason for this statute, but the wording of a later sewers act[2] leads one to the conclusion that some persons had challenged the right of sewers commissioners to invoke those powers listed within the commission of 1427. Because there was no clause explicitly deputing the powers of the commission to the commissioners, the 1429 act confirmed their right to perform and execute the "Things comprised within the said Commission".[3]

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[1] Gray, Influence of The Commons, p. 315.

[2] 6 Hen. VI, c.5; Statutes of the Realm, 2:232.

[3] Gray, Influence of the Commons, p. 314.

Apart from this afterthought, the only legislation until 1515 consisted of either extensions or revivals of the 1427 statute. It was allowed to lapse on 25 March, 1438, exactly ten years after the dissolution of the parliament that created it, but the parliament of 1439-40 granted it another ten year period of grace.[4] It is significant that the parliament of 1445-46 saw fit to extend the 1427 act well before it was necessary. Like its antecedent of five years earlier, the 1445 statute made reference to the unremitting dangers confronting those parts of the realm subject to inundation.[5] One can detect an underlying acknowledgment of the importance of the commissions in this description. Thus, it comes as little surprise that the term of prolongation for the 1427 act was then increased from ten to fifteen years.

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[1] 8 Hen. VI, c.3.

[2] 12 Edw. IV, c.6. It read, "because that the Commissioners, named in the said Commissions, had not full Power nor Authority to do perform and execute things comprised in the said Commissions".

[3] 8 Hen. VI, c.3. [4] 18 Hen. VI, c.10.

[5] 23 Hen. VI, c.8.

Although this may have offered greater longevity for the sewers commissions, it also placed the deadline for the renewal of the sewers statute amidst the turmoil of the Wars of the Roses. The 1445 act ran its course and no effort to revive the 1427 act was made until 1472. Nonetheless, the sewers commissions were not forgotten in the interim. In 1461, the first parliament of Edward IV passed an all-purpose statute which affirmed the legality of all commissions issued during the time of the "said pretensed Kings" (Henry IV, V, VI). The commissions of sewers were specifically named among others as being just as valid as if they had been "granted by any King lawfully reigning in this Realm, and obtaining the Crown of the same by just Title."[1] This did nothing to re-establish the lapsed sewers statutes but that did not seem to affect the Edwardian chancellors. They continued to appoint commissioners over the ensuing decade, the absence of statutory authority notwithstanding.[2]

When Edward first ascended the throne in 1461 his position was by no means secure.[3] After his expulsion and restoration in 1470-71, the situation was somewhat different. The battles of Barnet, in April, and Tewkesbury, in May 1471, resulted in the elimination of Lancastrian opposition and the death of Henry VI on 21 May.[1] Writs were issued for the summoning of parliament in August of the following year and the session convened on 6 October.[2] In this first parliament after the return of stability to England, a statute was passed which gave new life to the 1427 sewers act. It recited all prior sewers legislation, the entirety of which was enacted under Henry VI. This legislation was accorded legitimacy by recognition of the *de facto* sovereignty of the recently deposed Henry--"late indeed and not of Right King of England". The statute also expanded the jurisdiction of the 1427 act to include the "Marches of Calais, Guynes, and Hammes", in addition to the previously designated area of "all Parts of this Realm of England". It was to remain in effect for fifteen years.[3] In 1489, the second parliament of Henry VII once again reforged the legislative chain of sewers statutes but this time awarded a new and improved lifespan of twenty-five years.[4]

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[1] 1 Edw. IV, c.1-xvi. [2] Kirkus, p. xxi.

[3] Jacob, Fifteenth Century, p. 528.

The 1515 statute was the first to show any departure from the simple norm of extension or revival.[5] It presents an interesting case because, in a small way, it augured the new vigour that would brace the sewers commissions in 1532. The statute began in standard fashion by confirming the validity of all preceding sewers acts. It then attested to its main purpose by admitting that the twenty-five year limit set in 1489 had expired. However, it upheld the lawfulness of any ordinances made by sewers commissioners during the hiatus between the expiry date and the beginning of the new parliament. Then, in an innovative stroke, it introduced the qualification that a man must hold a £20 freehold estate or be a quorum member of the commission of the peace to gain a place on the sewers commission.[1] It should be noted that, in its obvious attempt to upgrade the quality of sewers commissioners, parliament had at the very least raised the eligibility standards of the commission to an equal footing with those of the commission of the peace.[2] The amendment, the first of any consequence since 1427, could be representative of the idea that repeated renewal of century-old legislation was no longer adequate.

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[1] Jacob, Fifteenth Century, pp. 568-69.

[2] Powicke and Fryde, Handbook, p. 533.

[3] 12 Edw. IV, c.6. [4] 4 Hen. VII, c.1. [5] 6 Hen. VIII, c.10.

Another deviation from tradition in the 1515 act was an alteration to the normal style of extending the statute. Whereas previously it had always been done for a set term of years, one that had lengthened through the fifteenth century, it was now ruled, "This Acte to endure butt for X yeres, and fro the end of the same X yerys unto the next parliament".[3] Several inferences can be taken from this new policy. By shortening the number of years in the continuance, parliament may have been intimating that wholesale reappraisal of the sewers commissions was being contemplated for the not-too-distant future. The stipulation concerning the statute's survival until the next parliament after the ten year period would ensure that, as long as parliament did not pass over the business once it met, the statute would not be allowed to die of neglect before a parliament could tend to it. Beyond these speculations it is impossible to divine the purpose in this change of legislative behaviour.

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[1] 6 Hen. VIII, c.10.

[2] J. H. Gleason, The Justices of the Peace in England, 1558 to 1640 (Oxford: Clarendon Press, 1969), p. 47.

[3] 6 Hen. VIII, c.10.

Both Robert Callis and Mary Kirkus confused the matter by suggesting that the 1515 statute had expired,[1] even though simple mathematics show the ten year limit enduring until 1525. The next parliament after that date met in 1529 and was still sitting in 1532 when it passed the statute of sewers. A footnote to the question arises from a proclamation issued in 1526, a time when we would still expect the commissions to be operative by virtue of a live statute. It ordered all of the king's commissioners in the London area, with those of the peace, subsidy, and sewers specifically named, to appear in the star chamber before Cardinal Wolsey.[2] No reason was given for this command, and a few years later parliament would create a sewers statute that would make all its forbears seem insignificant by comparison.

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[1] Callis, p. 254; Kirkus, p. xxi.

[2] P. L. Hughes and J. F. Larkin, eds., Tudor Royal Proclamations (New Haven, Conn.: Yale University Press, 1964), 1:153-54.

# CHAPTER III

# THE GREAT STATUTE OF SEWERS, 1532

## i. Background

The "generall Acte concernynge Commissions of Sewers"[1] of 1532 was a milestone, although labelled "mundane" by Professor G. R. Elton,[2] and it is as fascinating and deserving of attention as many of its more famous statutory siblings of the same era. It is unique for a number of reasons, not the least of which is the treatment accorded it by historians. While some lip service has been paid to the significance of the 1532 act (interested commentators have applied such adjectives as "great" and "celebrated"),[3] detailed investigations are scarce. Professor Elton did indeed ascribe this statute and similar legislation to the new method and planning of Thomas Cromwell's administration.[4] However, it is obvious that for him it was little more than an example to be used in supporting the wider theme of Cromwellian reform. In contrast, Professor S. E. Lehmberg designated it "the most important piece of economic legislation" of the 1532 session, but then neglected to explain why this should be so.[1]

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[1] 23 Hen. VIII, c.5-i.

[2] G. R. Elton, Reform and Reformation: England, 1509-1558 (London: Edward Arnold, 1977), p. 147.

[3] Ibid.; Webb and Webb, Statutory Authorities, pp. 19-20.

[4] G. R. Elton, Reform and Renewal: Thomas Cromwell and the Common Weal (Cambridge: University Press, 1973), p. 122.

It appears that the only authority to have devoted a substantial amount of time and attention to the 1532 statute of sewers was the seventeenth-century lawyer, Robert Callis. He was a native son of Lincolnshire and a sewers commissioner for that county,[2] and so could be expected to have had more than the average interest in the topic of land drainage. Admitted to Gray's Inn during the 1590s,[3] he rose to the upper levels of his profession in due time. In 1617 he gave the Lenten reading at Staple Inn, one of the inns of chancery. This earned him a minor degree of notoriety and, undoubtedly, the approbation of his colleagues, for his lectures included a defiant response to the attack made on the legal profession in the 1614 satire Ignoramus, by George Ruggles.[4] Promotion to the bench of Gray's Inn occurred during or just prior to 1622. Callis delivered his "Reading upon the statute of 23 Hen. VIII, c.5" there in August of that year. In 1627 he was made a serjeant-at-law.[5] Both his readings were eventually published, which in itself makes him worthy of note,[6] and his second effort was cited by Sir William Blackstone as "a work of very good authority" on sewers.[1]

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[1] S. E. Lehmberg, The Reformation Parliament (Cambridge: University Press, 1970), pp. 155-56.

[2] DNB, 3:712.

[3] Wilfrid Prest, The Inns of Court under Elizabeth I and the Early Stuarts (New Jersey: Rowman and Littlefield, 1972), p. 32 n. 26.

[4] John Nichols, The Progresses, Processions, and Magnificent Festivities of King James the First (New York: Burt Franklin, 1828), 3:90 n. 2; Prest, Inns of Court, p. 209.

[5] DNB, 3:712. [6] Prest, Inns of Court, p. 120.

Callis' reading is an extremely comprehensive legal and historical interpretation of the statute of sewers. Its length and thoroughness alone give testimony of his conviction as to the importance of the 1532 act, but Callis himself provided us with all the explicit confirmation of his opinions we could want. In his own words, he felt moved to expound on it because

> .. . upon perusal of the Statute, and upon due consideration taken of others, I thought I could not make my choice of a more fitting, and more necessary Law, nor more profitable for my Native Countrey of Lincolnshire, and other Maritime Places of this Kingdom,than this is.

Other reasons given by Callis for his preference included: "the Antiquity of these Laws of Sewers"; "the largity and extent thereof, which appears in the style of the Statute"; and also "For the necessary use thereof, which continued practice and daily experience teacheth us."[2] To Robert Callis, the statute certainly rated higher than 'mundane'. The widespread circulation of manuscripts of his reading and its eventual publication in 1647 attest to the fact that he was not alone in his interest.[3] Callis' thinking, when taken into account with the controversies to be discussed below, serves to illustrate a point. The great statute of sewers of 1532 touched the lives of sixteenth and seventeenth-century Englishmen in a fundamental way that has been largely overlooked by the clinical eye of the twentieth-century scholar.

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[1] Blackstone, Commentaries, 3:73 n. 4.

[2] Callis, p. 23. [3] Prest, Inns of Court, p. 120.

This act was a product of one of the longest, most written-about and debated parliaments in English history. Despite such intense historical interest, surviving evidence of the Reformation Parliament does not match that for later Tudor times. However, much depends on creating a context for legislation and the endeavour to determine the relationship in time between individual debates and statutes.

The Reformation Parliament was a forum for the introduction of profound changes into a number of different spheres of English life, including that most sensitive one of religion. Its third session sat from 15 January to 14 May, 1532, with a two week recess at the end of March. It was the arena in which the "principal architect" of the break with Rome, Thomas Cromwell, fought for and conclusively won the political dominance he needed to engineer such a policy.[1] The 1532 session saw "the first serious attack on the papal power in England", in the form of Cromwell's act of annates,[2] which was passed in the first sitting on 21 March. This month also saw the introduction of the overriding issue which was to claim practically all of parliament's attention after it reconvened on 10 April: The Commons' Supplication against the Ordinaries.[3] In the midst of this anti-clerical uproar, parliament somehow found time to pass the statute of sewers. However, there is some doubt as to exactly when this occurred.

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[1] Elton, Reform and Reformation, pp. 146, 155-56.

[2] Ibid., p. 148.

[3] G. R. Elton, "The Commons' Supplication of 1532: Parliamentary Manoeuvres in the Reign of Henry VIII," English Historical Review 66(1951):507-34.

Sources for the chronology of the 1532 session seem mesmerized by the high-profile topics listed above. Few other of the thirty-four statutes passed during this time are given much scrutiny. Edward Hall's Chronicle made mention of the Supplication, the act of annates, and the two noteworthy government failures of the session: abortive attempts to pass one bill controlling *primer seisin* and uses, and another to finalize a subsidy from parliament.[1] Of the letters of Thomas Cromwell presented in Professor R. B. Merriman's biography, just one is concerned with this particular session and it alludes only to the act of annates.[2] Eustace Chapuys, the Imperial ambassador to the Tudor court, has been considered by Professor Elton to be the principal witness for the events of 1532.[3] Between mid-February and the end of May he provided Charles V with a series of ten reports, nine giving information on the activities of parliament but none referring to the statute of sewers.[4]

Nevertheless, it is upon Chapuys' observations that Professor Lehmberg appears to have based his deduction that the statute, along with others of a similarly less contentious nature, was passed during the second sitting of the session, in April or May.[1] In a letter to Charles V on 14 February, Chapuys mentioned the failed bill of *primer seisin* and uses and one that passed concerning the importation of new wines, and noted that "nothing else has been done in the said Parliament."[2] Then on 20 March, after two more letters which discuss only the act of annates and the prospect of a parliamentary grant,[3] Chapuys confirmed the passing of the act of annates and remarked that the impending divorce case was not broached in parliament, "Nor has any other important measure that I know of been discussed or announced."[4] Chapuys' letter was dated only eight days before the recess, so on the strength of its evidence one would be inclined to presume that the sewers statute was passed in April or May. Judging from the documentation used by Professor Lehmberg in his account of January through March, he arrived at his reckoning in exactly this fashion and it would seem, at first glance, to be the most accurate conclusion.

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[1] Edward Hall, Chronicle, 1809 ed. (New York: AMS Press, 1965), pp. 784-85.

[2] R. B. Merriman, Life and Letters of Thomas Cromwell (Oxford: Clarendon Press, 1902), 1:343.

[3] Elton, "Commons' Supplication," p. 512.

[4] Calendar of Letters, Despatches, and State Papers, relating to the negotiations between England and Spain . . ., ed. Pascual de Gayangos (London: Longman's & Co., 1882), 1531-33, pp. 383-448.

However, there are certain points to be made in favour of the case that the act of sewers was indeed passed in the early part of the session, before the strife-filled month of March. Firstly, the well-established unreliability of Chapuys as a reporter should give general reason for pause.[5] Secondly, particular notice should be taken of his choice of words, ". . . any other important measure that

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[1] Lehmberg, Reformation Parliament, pp. 131-154, 155.

[2] CSP-Span. 1531-33, p. 383.

[3] Ibid., pp. 390-91, 405. [4] Ibid., p. 411.

[5] Elton, "Commons' Supplication," pp. 512-13.

I know of . . .". Chapuys did not 'know of' the Supplication until April, although the petition had been taken to the king in mid-March.[1] Also, what did 'important' mean to Eustace Chapuys? As Imperial ambassador he would be looking for any indications of the attitude of king and parliament towards his master, Charles V, his master's aunt, Catherine of Aragon, or his master's self-assumed responsibilities to the papacy. Thus, he would be much more sensitive to an issue such as the act of annates or Henry's efforts to divorce Catherine rather than one such as sewers. He may simply have passed over it in his reports.

Although Chapuys named the bills of *primer seisin* and importation of wines as being introduced early in the session without referring to the sewers bill, there is some reason to believe that it was chronologically grouped with these two topics. In the fall of 1531, Henry forwarded to Cromwell a schedule of matters to be given priority in the succeeding months.[2] Approximately halfway through the list, all in a row, were three bills to be prepared for parliament. They were, in order: a bill restricting importation of wines, a bill concerning *primer seisin*, and a bill for sewers. It was specified of the last two that they were to be ". . . put in a redynes ayenst the begynyng of the next Parliament."[3] Those two bills which did attain statutory status, importation of wines and sewers, appear together in the parliamentary roll and on the list before the act of annates.[1]

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[1] Elton, "Commons' Supplication," pp. 513-17.

[2] State Papers published under the authority of His Majesty's [George IV] Commission, King Henry the Eighth (London: 1830), 1:380-83.

[3] Ibid., 1:382.

This accords with Professor Elton's theory about Cromwell's advance planning for the 1532 session. By his reckoning, discussion of financial business was actively promoted at the onset of the session and the attack on the church was deliberately delayed until later.[2] Indeed, the Submission of the Clergy, their eventual response to the Supplication, was not officially presented to the king until 16 May, two days after the session ended.[3] Thus, it follows that the vast majority of time spent in the Lords and Commons after 18 March was probably given over to debate on the issues raised by the Supplication. Professor Elton's theory is well-served by the actual course of events. Equally so is the conclusion that the bill for sewers must have been passed in the early part of the session, simply for lack of any other suitable time.

Above all, there can be no doubt that the sewers statute was spawned by the longest and perhaps most important session of the Reformation Parliament.[4] The 1532 session marked the beginning of "the real attack both on the papal position in England and the liberty of the English church." It also confirmed the political ascendancy of the tactical mastermind of this onslaught, Thomas Cromwell.[5] The fact that the sewers statute was conceived during a period so crucial to the course of English constitutional growth should in itself commend it to our special attention, and it may also lend support to Professor Elton's thesis that the church matter was but one theme in a major reconstruction of society and government.

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[1] L. and P. Hen. VIII, 5:343.

[2] Elton, "Commons' Supplication," p. 527. [3] Ibid., p. 533.

[4] Elton, Reform and Reformation, p. 147.

[5] G. R. Elton, The Tudor Revolution in Government (Cambridge: University Press, 1953), pp. 94-96.

Furthermore, the sheer length of the act, especially when considered within its parliamentary context, is remarkable. It is longer than any other bill passed in 1532 with the exception of a private land bill, which includes a copy of a charter.[1] It is one and a half times as long as the much more renowned act of annates.[2] The length of a statute may give some indication as to the amount of time expended upon it in parliament, and it certainly reflects upon the time that someone was prepared to expend in its formulation. All signs point to the 'someone' being Thomas Cromwell: indeed, he included a proposed sewers act on his 1531 list, thought by Professor Elton to be "the first extant evidence for the preparation of government bills".[3] Here we have a man who was readying himself for a meeting with parliament that he knew could well prove to be the turning point in the battle with the papacy and thus in his own career.[4] In planning for this climactic session he scheduled on his agenda a bill that obviously required a considerable commitment of time, either on his part or on the part of the parliament he was so concerned with controlling. All of the above can only serve to invest the 1532 sewers statute with an inherent significance it has rarely been accorded to date.

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[1] 23 Hen. VIII, c.21. [2] 23 Hen. VIII, c.20.

[3] Elton, Reform and Reformation, p. 146.

[4] Elton, "Commons' Supplication," passim.

The question remains as to why the issue of sewers surfaced at such a critical stage. On a general note, it may be suggested that the sewers statute was a fragment of Cromwell's overall plan for reform, which first began to bear fruit in the 1532 session. Across the 1530s, bills were advanced for the conservation of woodlands and the regulation and protection of fishing rights. In conjunction with these, the sewers statute is proof of Cromwell's "abiding interest in the reform of the commonweal" and his attempt to "preserve the realm's assets".[1]

There were some pressing reasons for a new sewers act in 1532. One factor was the life-term of the 1515 statute.[2] Initially summoned for 1529, the Reformation Parliament by 1532 had lasted for three years and was into its third session. It was already long-standing by the standards of previous parliaments.[3] The government had no way of knowing that this same assembly was to survive for an unprecedented total of seven years, and so it must have seemed that the session in question presented a last chance to pass the bill for sewers. Had the issue been of minor importance, the inclination to allow the statute to lapse and be revived in a later parliament might have been strong on the part of the government. Examples of such practice had already been set during the fifteenth century. What is more, the newly established partnership of Cromwell and Henry VIII was embarking on the journey that eventually would result in the break with Rome. A certain disregard for other objectives would be understandable, perhaps even expected.

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[1] Elton, Reform and Reformation, p. 147; Elton, Reform and Renewal, p. 121.

[2] supra, pp. 27-28.

[3] Of the four previous parliaments in Henry's reign, the longest sat for three sessions spanning two years. Powicke and Fryde, Handbook, p. 535.

Such momentous events notwithstanding, the government obviously realized its responsibility in such a fundamental administrative matter and acted upon it. The preamble of the statute gives evidence of the king's cognizance that legislation was needed--"the king, . . . considering the daylye greate damages and losses whiche have happened in . . . this his said Realme . . ."--and of his desire to correct such a situation.[1] Of course, this admirable sense of responsibility was not entirely inherent or intrinsic. In 1531 a petition was presented to the king, complaining of inundation in the fen country, particularly around Ely, and of the fact that the sea defences had fallen into disrepair.[2] Thus, the government had been reminded of the need for action. Also, its concern in seeing a sewers statute passed may not have been completely for the welfare of the kingdom's inhabitants.

The 1530s were a time when "relative penury" was forcing Henry to take a longer look at all sources of income available to him. The abortive bill on *primer seisin* and uses, and ostensibly the act of annates, were both measures designed to increase royal revenue.[3]

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[1] 23 Hen. VIII, c.5-i. [2] L. and P. Hen. VIII, 5:24.

[3] Elton, Reform and Reformation, pp. 147-49.

There are sufficient grounds to suggest that Henry and Cromwell also saw money-making potential in updated sewers legislation. Of course, the essential worth of land would be a factor in any situation where it was being reclaimed and thus restored to value. However, we have evidence of a more specific nature. In December 1532, a letter to Cromwell mentioned a selection of "marshes laid out for the King", presumably to be drained. Assurances were given that the king's interests would be protected. Another letter of 1532 was directed to Mr. Stedlaff, a commissioner of sewers in Surrey. The writer detailed an instance of interference with commissioners of sewers who dared to declare the "King's weirs" unlawful because they constituted encroachments of some kind.[1] From this we can form a picture of direct royal involvement in profit-seeking ventures concerning land drainage and, in at least one case, of tampering, probably to ensure more favourable land distribution for the royal interest. In turn, this should serve to foreshadow government manoeuverings in the field of land drainage that were to characterize the first four decades of the seventeenth century.

### ii. The Place of the 1532 Statute

As a product of the Reformation Parliament, the 1532 sewers statute merits study within the context of English constitutional development. According to Professor Elton the Reformation Parliament occupies a pivotal place in history, particularly with respect to the development of the English constitution and the growth of parliament as an institution. His basic premise can be linked to that of his predecessor, Professor A. F. Pollard, who saw the emergence of national sovereignty through parliament under the Tudors.[1] In Professor Elton's words, "parliament entered upon its proper career in the sixteenth century."[2] However, in place of the Pollardian theme of "evolution", he asserted that parliament reached this stage of maturity through the agency of revolution. The prime revolutionary was Thomas Cromwell and his major weapon was that of statute. Professor Elton credited his "Tudor revolution" with having "acknowledged the supremacy of statute on which the modern English state rests."[3]

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[1] *L. and P. Hen. VIII*, 5:678, 720.

An important question springs to mind here. What was there about the nature of statute that enabled it to become supreme, and thus provide for a new-found modernity of state? Professor Elton's answer to this lies in his definition of the difference between medieval and modern government. The former was declaratory, it "discovered the law and then administered it". Professor Elton qualified his description by adding that this process often made a pretence of "discovering" when in fact it was creating law. On the other hand, "modern government first makes and then administers laws". This change freed parliament from "the limitations of the laws divine and natural" and laid the foundation for modern constitutional monarchy, the basis of which is the "sovereignty of king in parliament". Much of the weight of Professor Elton's thesis rested on his belief that this transition "quite definitely" occurred during the 1530s.[1]

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[1] A. F. Pollard, The Evolution of Parliament (London: Longmans, Green & Co., 1920), chapter 11 passim.

[2] G. R. Elton, England Under the Tudors, 2nd ed. (London: Methuen & Co., 1974), p. 14.

[3] Ibid., p. 168.

Thus, in Professor Elton's exercise, the changing nature of statute and its role in government became a measuring stick by which different eras in constitutional growth could be demarcated. However, his use of this gauge and the conclusions he reached with it have not by any means met with total agreement from other historians. There are a number of different theories as to the nature of both fifteenth and sixteenth-century statutes and the kind of contemporary attitudes towards parliamentary sovereignty which they reflected. Professor Elton's claims for the establishment of the supremacy of statute under the Tudors have been countered by those who make a similar claim for the fifteenth century.[2]

In the early seventeenth century, Sir Edward Coke commented on the classification of statutes.

> Of Acts of Parliament some be introductory of a new law, and some be declaratory of the ancient law, and some be of both kinds by addition of greater penalties or the like. Again, of Acts of Parliament, some be generall, and some be private and particular.

Coke further specified that the key to divining whether a statute was introductory of new law or declaratory of old was to know what the common law was before the legislation.[1] The basic connections are those between the declaratory statute and the common law, and the introductory statute and new law. Professor Elton saw the difference between these two kinds of statute to be the distinction between medieval and modern legislation. He allowed that "by the late fifteenth century it was generally accepted that statutes enacted in parliament were laws of special authority" but insisted that "these were vague gropings still."[2] Conversely, Professor T. F. T. Plucknett offered evidence that there was practical recognition of "special" or "novel ley" (extraordinary or new law manifest in statute) as early as the fourteenth century.[3] Professor S. B. Chrimes expressed reservations about the inference made by Professor Plucknett from the term "novel ley", suggesting that it might merely mean "new statute" and not necessarily "new law".[4] However, he himself saw proof of a medieval recognition of the contrast between common law and new law manifest in statute, both in the theories of Sir John Fortescue and in the Year Books, where distinction is made between statutes introducing new law and those declaring old.[5]

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[1] Elton, England Under the Tudors, p. 168.

[2] S. B. Chrimes, English Constitutional Ideas in the Fifteenth Century (Cambridge: University Press, 1936), pp. 213-214; B. Wilkinson, Constitutional History of England in the Fifteenth Century (1399-1485) (London: Longmans, Green & Co., 1964), p. 297; R. W. K. Hinton, "English Constitutional Theories from Sir John Fortescue to Sir John Eliot," English Historical Review 75(1960):415-16; G. L. Harriss, "Medieval Government and Statecraft," Past and Present 25(1963):20-24.

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[1] Coke, 4 Institute, p. 25; Chrimes, Constitutional Ideas, p. 249.

[2] Elton, England Under the Tudors, p. 14.

[3] T. F. T. Plucknett, Statutes and their Interpretation in the First Half of the Fourteenth Century (Cambridge: University Press, 1922), p. 30.

[4] Chrimes, Constitutional Ideas, p. 25.

[5] Ibid., pp. 254-56. For evidence of Fortescue's understanding of the difference between the common law and that created by parliament, see Hinton, "Constitutional Theories," pp. 414-416.

Statutes may also be classified according to whether they are positive or negative; in other words, whether they promote or command certain actions, or forbid them. Professor Chrimes made the qualified generalization that those statutes affirming the common law were couched in positive terms while those which defeated the common law or provided for new law were expressed negatively. He suggested that negative statutes were "treated as if they were introductory of new law" and presented evidence that a distinction on the above grounds was being made by the latter half of the fifteenth century.[1]

Another of Coke's divisions recognised the difference between statutes of a general or particular nature. The former were applicable to the entire realm in all cases and the courts automatically recognised their authenticity. The latter were created for particular areas, instances, or private persons. They were interpreted more strictly, with the onus upon the pleader to prove their existence if they were used in legal argument.[2]

In summary, the constitutional theorists have provided three basic strata into which statutes can be collated, each offering two choices: declaratory or introductory; positive or negative; general or particular. Added to these should be a fourth possibility, that hybrid class of parliamentary act mentioned by Sir Edward Coke which is of "both kinds [declaratory and introductory] by addition of greater penalties or the like." Certain statutes were passed which neither merely affirmed the common law nor promulgated entirely new law. They presented jurists with a perplexing ambiguity regarding classification because they improved upon or abridged existing law.[1]

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[1] Chrimes, Constitutional Ideas, pp. 259-60.

[2] Ibid., p. 264.

These criteria should be applied to the sewers statutes of 1427 and 1532 because, as specimens from each of the eras championed by historians, they afford an unique opportunity for comparison. Commencing with the title, we find that the 1427 act has none whereas the later one is headed, "A generall Acte concernynge Comissions of Sewers to be directed in all partes within this Realme".[2] This difference simply shows that each of the statutes reflect the custom of their own time.[3] Both acts have a preamble and each serves its purpose, which is to recite the "mischief to be remedied and the scope of the Act."[4] Using almost identical language, in each instance the preambles identify the same "mischief" in need of remedy, (in a word, inundation) and provide for the same area of influence, "all Parts of the Realm where shall be needful".[5] In light of their jurisdictional latitude,it becomes apparent that the statutes are general. Also present in both preambles are references to the authority of king in parliament. In the 1427 act, which is chapter five on the statute roll for the sixth regnal year of Henry VI, the preamble speaks of "Our

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[1] Chrimes, Constitutional Ideas, pp. 257-58.

[2] 23 Hen. VIII, c.5-i.

[3] J. Anwyl Theobald, ed., On the Interpretation of Statutes by Sir Peter Maxwell, 4th ed. (Toronto: The Carswell Co., 1905), p. 59.

[4] P. St. John Langan, ed., Maxwell on the Interpretation of Statues, 12th ed. (London: Sweet and Maxwell, 1969), p. 7.

[5] 6 Hen. VI, c.5; 23 Hen. VIII, c.5-i.

Sovereign Lord the King", who ordains by the "Advice and Assent aforesaid",[1] the meaning of which is to be found at the head of the roll in question.[2] When compared to the phrasing in the 1532 preamble, ". . . advyse and assent of his Lordes spirituall and temporall and also his loving Commons",[3] the words of the earlier act suggest that the Commons of 1427 were still in the position of petitioners. Indeed, they were not to become equal partners of the Lords in the ratification of legislation until much later in the fifteenth century.[4]

Although the similar wording in both preambles serves to create a superficial likeness between the two, there are some fundamental differences. First and most obvious is that of length, the 1532 preamble being over three times longer than that of its predecessor. This is due to the prolix description of the "mischief to be remedied" and the addition of a subtle but nonetheless real fragment of government propaganda. While the more succinct 1427 preamble is content with the simple designation of "our Sovereign Lord the King",[5] the later document describes Henry VIII as a "virtuouse and mooste gracious Prince", to whom nothing is more important than "the avauncynge of the common profitte, welthe, and comoditie of this his Realme".[6] There is also a reference to previous legislation on the matter, with the comment that none of it was "sufficient remedye for reformacion of the premisses".[1] One could infer from this that the present administration was confident of resolving a problem that had proved insurmountable to those it succeeded. These traits reflect an interest in preambles on Thomas Cromwell's part which Professor Elton believed became noticeable around 1532. Cromwell used preambles as vehicles for the "expounding of policy" and it is in them that invariably "the great principles occur".[2] Other than the aforementioned kudos given to Henry, which could be considered depictive of his own grand ideas about monarchy, there seems to be no presence of 'great principles' in the 1532 preamble. However, the air of self-assured competence tempered with paternal benevolence has a unmistakable Cromwellian flavour.

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[1] 6 Hen. VI, c.5. [2] supra, p. 23.

[3] 23 Hen. VIII, c.5-i.

[4] Wilkinson, Constitutional History, pp. 283-84.

[5] 6 Hen. VI, c.5. [6] 23 Hen. VIII, c.5-i.

The sections immediately following the preambles in both statutes are, according to marginal notes, the "Form" of a commission of sewers. From a legal point of view, these notes are of little interpretative value,[3] but they do help to create workable divisions for the purpose of discussion. The 1427 act consists of only two such divisions, the preamble and the form of the commission, while the later one is made up of preamble, commission, and then fourteen appended clauses, followed by the "Continuance" of the act at its conclusion.

The sample commissions served a two-fold purpose. They clearly provided a format for the issuing of the actual commissions of sewers, because they were addressed to individuals, as signified by the use of letters "A", "B", and "C", and there were spaces left in the text of the 1532 act for the names of the designated counties for which each commission was created.[1] They were also the means by which the statutes made known the responsibilities and powers of the commission. Making an immediate impression in the first act is the injunction to sewers commissioners "to hear and determine" and "to make and ordain Statutes and Ordinances . . . according to the Law and Custom of our Realm of England, and the Custom of Romney Marsh."[2] A similar enjoinder in the 1532 statute reads: "to make and ordeyne statutes ordinaunces and provysions . . . after the lawes and customes of Romney marshe in the Countie of Kente."[3] Thus, it seems quite evident that both acts were founded upon common and customary law and it would then logically follow that they merit classification as declaratory statutes. In the case of the 1427 statute, this assessment is strengthened by the analysis of its function presented above.[4] The statutory application of long-ensconced local custom and practice must fall within the definition of declaratory legislation.

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[1] 23 Hen. VIII, c.5-i.

[2] G. R. Elton, "The Evolution of a Reformation Statute," _English Historical Review_ 64(1949):178 n. 2; G. R. Elton, _The Tudor Constitution_ (Cambridge: University Press, 1972), p. 334.

[3] Langan, _Maxwell_, pp. 9-10.

Yet if we look to the 1532 statute for similar reinforcement of such an appraisal, it cannot be found. The connection with common and customary law cannot be denied, as is witnessed by the reference to Romney Marsh. However, close inspection reveals dissimilarities between the example commissions of the respective statutes. In the later act there is a commandment for the justices of sewers to "ordeyne and doo after the fourme tenure and effecte of all and singuler the estatutes and ordnaunces made before the firste day of Marche [1532] . . . touching the premisses".[1] Thus, the 1532 act of sewers is based on existing statute law as much as it is on the common law. Albeit a major bulwark of its legislative foundation is the 1427 act, it does more than simply repose upon the established solidity of this predecessor. Where 6 Hen. VI, c.5 merely ordered commissioners throughout England to make and ordain statutes according to the laws and customs of Romney Marsh, 23 Hen. VIII, c.5 added that they might also do so "otherwise by any wayes or meanes afteyr [their] owne wisedomes and discrecions".[2] Other references to discretionary powers for sewers commissioners can be found in the 1532 commission in places where there are none in that of 1427.

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[1] 6 Hen. VI, c.5; 23 Hen. VIII, c.5-i. In the 1427 act, Lincolnshire was used as an example.

[2] 6 Hen. VI, c.5. [3] 23 Hen. VIII, c.5-i.

[4] supra, p. 17.

The fourteen clauses that follow the commission in the body of the 1532 statute constitute an enlargement upon 1427 by their mere presence. They perhaps represent an attempt by legislators to anticipate any potential loopholes in the statute and ensure their closure in advance. For example, the 1427 act did not have an explicit statement authorizing sewers commissioners to invoke the powers listed in the commission, and so in 1429 a special act doing just that had to be created. In the 1532 statute, the role of the 1429 act was performed by one of the clauses.[3] Eventualities such as the refusal of citizens to pay taxes assessed by commissioners, or lawsuits brought against commissioners, were also dealt with. Provision was made for everything from administrative minutiae, such as specific fees for the writing and sealing of commissions and remunerations for clerks, to jurisdictional stipulations for the counties Palatine, Wales and the duchy of Lancaster.[1] The attention to detail is remarkable.

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[1] 23 Hen. VIII, c.5-i. [2] Ibid.

[3] Ibid., iv.

The awarding of discretionary powers to the commissioners would later result in contention, but in 1532 the ultimate aim was obviously to clarify the government's position on the matter of sewers, and to have the law stated in black and white with as few grey areas as possible. This characteristic above all must serve to disqualify 23 Hen. VIII, c.5 from the declaratory classification, for it makes it a certainty that the statute was meant to be construed precisely to the letter. By the end of the fifteenth century it had become axiomatic that, while declaratory statutes were to be interpreted equitably, only the strictest interpretations could be applied to introductory statutes.[2] The sewers act was meant to be a precise enunciation of government policy, and as such it displays a feature normally associated with introductory statutes. Nevertheless, the emphasis was upon the explanation, improvement and enlargement of existing law, both that rooted in the common law and that already manifest in statute. Indeed, the 1532 act seems to qualify as one of Coke's exceptional breed of statutes, those 'of both kinds', introductory and declaratory.

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[1] 23 Hen. VIII, c.5-ii-xv.

[2] Chrimes, Constitutional Ideas, pp. 258, 262; Elton, England Under the Tudors, p. 169.

Although the great sewers act itself cannot be easily categorized, when compared with the statute of 1427 it becomes representative of an attitude that can definitely conform to Professor Elton's idea of modern legislation. The 1427 act in contrast performed a rather simple task. Basically, it gave government authorization to a group of age-old customs that were already in use in certain localities and provided for their uniform practice throughout the country. It declared and standardized the law but in a general and sometimes vague fashion. On the other hand, the 1532 statute, by widening the powers of the sewers commissions almost effected their rebirth; at least that was its intention. This is evidenced by that sense of a fresh approach to an old problem so confidently expressed in the preamble. Most of all, the 1532 act was comprehensive. By delving into its subject with a thoroughness not apparent in its predecessor, it showed a "deference to statute" on the part of its enactors that accords with Professor Elton's theories on the modernity of the legislation of the 1530s.[1]

The 1532 statute of sewers played no part in the break with Rome or the establishment of the royal supremacy. Nevertheless, it was a statute of reform, and it did incorporate the zealous spirit of change and optimism for the future that so characterized its more renowned statutory brothers and the era that produced them. As a matter of fact, this regenerative vitality was not to prove illusory as it did in some Reformation statutes, for the 1532 sewers act was to remain "the basis for successive commissions of sewers until the nineteenth century."[1]

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[1] Elton, England Under the Tudors, p. 169.

## iii. Subsequent Tudor Legislation

The 1532 statute was not the final word on sewers commissions from Henrician government, nor even the Reformation Parliament. A scant two sessions after its major effort the latter produced a minor statute, seemingly an afterthought, which ruled on two specific points and caused no noticeable changes in the general government policy outlined in 1532. The 1534 act simply extended the jurisdiction of 23 Hen. VIII, c.5 to include Calais and, in a second and final paragraph, provided for the punishment of any persons who refused to take the oath of a commissioner of sewers after being selected to serve.[2]

This supplementary statute was a product of the fifth session of the Reformation Parliament, which sat from 15 January to 30 March, 1534. These two and one-half months constitute a particularly prolific and industrious period in the history of that parliament. Although the salient religious issue of heresy drew much attention, the session focused primarily on those essential administrative details so necessary for the running of the country. Such affairs had lain neglected during the pursuit of a solution to Henry's marriage problems, but now parliament went about its business in a "workmanlike fashion" and managed to create thirty-four statutes in eleven weeks.[3]

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[1] H. C. Darby, The Draining of the Fens, 2nd ed. (Cambridge: University Press, 1956), p. 5.

[2] 25 Hen. VIII, c.10-i, ii.

[3] Lehmberg, Reformation Parliament, pp. 182, 184.

Even amongst the mass of elementary legislation which characterized the session, the 1534 sewers act was a lesser statute, as witnessed by its marked brevity. Nevertheless, it was not totally a matter of routine, because it was initially rejected by the Lords and needed amendment.[1] It is not absolutely clear what changes were required, but there is a hint in the Calendar of Letters and Papers, which details parliamentary undertakings of February and March, 1534. Included is

> An act that if any commissioner of sewers do not his duty and make true certificate, he shall never after be trusted nor put in commission, be fined at the King's pleasure and proclaimed in every city and town corporate.[2]

This 'act' never bore fruition in statutory form. Since it is improbable that two entirely separate bills on the same subject were introduced in the same session, with only one being passed, it may be concluded that the above entry represents an aborted part of the bill that was eventually accepted. However, not too many years passed before the issue of culpable sewers commissioners was revived.

The parliaments of Henry VIII produced no more legislation on sewers commissions after 1534, but the topic remained an object of abiding governmental interest, much of the stimulus being provided by Thomas Cromwell's involvement. In addition, there was the normal administrative activity dealing with the commissions that one would expect from a government so concerned with the "reform of the commonweal".[3] The Calendar of Letters and Papers lists numerous grants for sewers commissions interspersed throughout the Cromwellian decade.[1]

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[1] Lehmberg, Reformation Parliament, p. 189 n. 3.

[2] L. and P. Hen VIII, 7:no. 399.

[3] Elton, Reform and Reformation, p. 147.

As principal secretary from 1534, the most significant of his many offices, Cromwell's influence permeated the complete spectrum of the administration, and he had an acknowledged penchant for the exacting business of governance on a day-to-day basis.[2] Nevertheless, none of his positions gave him the authority to issue sewers commissions.[3] Even so, it was to Cromwell that Sir Edward Boughton wrote in July 1533, requesting a sewers commission for Plumstead Marsh in Kent.[4] In September 1535, the duke of Norfolk asked that Cromwell act on a matter concerning sewers, presumably to put in motion forces which would result in the granting of commissions.[5] Included among a collection of Cromwell's papers for the early 1530s are a writ of *mandamus* for justices of sewers, a sealed commission of sewers, and a record of fines assessed to sewers commissioners.[6]

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[1] *L. and P. Hen. VIII*, 7:nos. 1026(34), 1601(4, 5); *L. and P. Hen. VIII*, 12-pt. 1:no. 1105(11); *L. and P. Hen. VIII*, 12-pt. 2:no. 1150(13); *L. and P. Hen. VIII*, 13-pt. 1:nos. 646(4, 48, 49), 887(8), 1309(6), 1509(17-20); *L. and P. Hen. VIII*, 15:no. 144(1). Counties the commissions were granted for included Cambridgeshire, Cheshire, Essex, Hampshire, Huntingdonshire, Kent, Lincolnshire, Norfolk, Suffolk, and Yorkshire. They were issued in the years 1534, 1537, 1538 and 1540.

[2] Elton, *England Under the Tudors*, p. 129.

[3] Cromwell was neither lord chancellor, lord treasurer, nor a chief justice of the central courts, and only the holders of these offices were empowered to grant commissions. 23 Hen. VIII, c.5-i.

[4] *L. and P. Hen. VIII*, 6:no. 860. [5] Ibid., 9:no. 308.

[6] Ibid., 7:no. 923 (xii, xxxv, xxxviii). *Mandamus* was a writ issued by a superior court to officers of an inferior jurisdiction, forcing them to do their duty. Henry Campbell Black, *Black's Law Dictionary*, rev. 4th ed. (St. Paul, Minn.: West Publishing Co, 1968), p. 1113.

As many as seven years after the passing of the sewers statute behind which he was the driving force, his efforts to ensure its execution had created enough notice to warrant comment by the duke of Suffolk, a particularly close companion of the king. Suffolk was most solicitous in wishing Cromwell success over what one can infer from the benediction to be a pet project of the latter.[1] The man had more than a passing interest in the sewers commissions.

If all of the above points to such a conclusion, nothing accentuates Cromwell's special concern for the subject more strongly than his mention of the 1532 sewers statute in a royal proclamation. Although it is still a matter of debate,[2] recent historians are convincing in their assertions that proclamations were not the instruments of Tudor despotism they were long thought to be.[3] Cromwell in particular showed great respect for statute in his use of proclamations,[4] and worked to create a statutory authority for them with a series of acts affirming their legal competence in specific areas.[5] His efforts culminated in the 1539 statute of proclamations, which provided "a general definition of the prerogative power to issue royal proclamations."[6] While the statute was "a major turning point in the enforcement of royal proclamations", the Tudor position on their use had become standardized well before 1539.[1] Generally speaking, proclamations were not utilized as independent legislative devices. "They normally did not compete with statutes or challenge the authority of Parliament"; rather, they worked in concert with statutes, aiding in their enforcement and enhancing their effect.[2] When viewed in this light, the importance of their application to the sewers statute becomes evident.

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[1] L. and P. Hen. VIII, 14-pt. 2:no. 4.

[2] Heinze, Proclamations, pp. 153-65.

[3] Ibid., p. 295; G. R. Elton, "Henry VIII's Act of Proclamations," English Historical Review 75(1960):208.

[4] G. R. Elton, Policy and Police (Cambridge: University Press, 1972), p. 217.

[5] Heinze, Proclamations, p. 109. [6] Ibid., p. 165.

The first proclamation having anything to do with the statute (#138) was originally ascribed to some time "after 1532", but irrefutably dated 1538 by Professor Elton.[3] It brings to mind both the problems tackled by the 1534 statute and the proposed penalties which had not then been passed. Local officers were ordered to do a better job enforcing certain statutes. Included with the act of sewers were those against rumour-mongering, vagabonds, and unlawful games and play, as well as those for the use of artillery and archery and the reformation of excess in apparel. The proclamation expressed the king's concern over the fact that these laws were not being properly observed, and laid the blame on "his justices, officers, and ministers". The latter were exhorted to "put into execution the laws and statutes above mentioned" and to have a "most vigilant and earnest eye and regard to the apprehension" of any person breaking the said laws. If no improvement were noticed after this "gracious admonition" from the king, delinquent officials were to be considered "very enemies of his commonwealth" and receive due punishment.[1]

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[1] Heinze, Proclamations, pp. 86-87, 292.

[2] Ibid., p. 294; Elton, Reform and Renewal, p. 164.

[3] Hughes and Larkin, Proclamations, 1:206; Elton, Reform and Renewal, p. 165 n. 16. The numbering system is that used by Hughes and Larkin.

These threats were more severe than those in preceding proclamations, and perhaps constituted an attempt to "compensate . . . for an inadequate system of enforcement".[2] Professor Elton thought Cromwell's motive was to "make it very plain that legislation was meant to be enforced" and that the proclamation was in "deep earnest".[3] One may recall that Cromwell had records of fines levied against sewers commissioners for dereliction of duty as well as a writ of *mandamus* for justices of sewers. When combined with the proclamation these suggest that, however long-lasting the policy created by the 1532 statute, it was not immediately having the desired effect. Additional measures were obviously deemed necessary.

Anxiety over problems in enforcing the statute of sewers did not end with Cromwell's demise. Proclamation #274 was issued in 1546 virtually a carbon copy of its forerunner save that it was pertinent only to the statutes of sewers and vagabonds. It admonished and threatened malefactors in the same language as the 1538 proclamation.[4] This evidence of ongoing difficulties in carrying out the designs of the sewers statute presages the major problems that were to be encountered by early seventeenth-century administrators.

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[1] Hughes and Larkin, Proclamations, 1:206-8.

[2] Heinze, Proclamations, p. 147.

[3] Elton, Reform and Renewal, p. 166.

[4] Hughes and Larkin, Proclamations, 1:274.

Three centuries of survival testify that the 1532 statute served its purpose as a vehicle for the formulation of long-term strategy. Nevertheless, the necessity for aid in the form of proclamations only six years after the statute was passed indicates that the mere action of parliament exerting the force of legislation on behalf of the sewers commissions was no longer enough. In spite of the incorporation of a 'weight of statute' philosophy into the 1532 act, it may be that this had already dawned upon Cromwell and any others who helped draft the bill. A new policy was to evolve after the reign of Henry VIII and it had its beginnings with a novel stipulation in the 1532 statute.

In 1427, no fixed time had been given for the lifespan of the sewers commissions and the act itself was only to stand for ten years. This did not endow the commissions with much of an aura of permanence; they were clearly the creations of expedience, each having a life only as long as that of the exigency it was intended to meet. However, in 1532 the statute was awarded a continuance of twenty years, and the commissions themselves a duration of three years.[1] In addition, any laws and ordinances made by commissioners were to last as long as the commission itself, and provision was made for the ingrossing and certification of commissioners' decrees, with royal assent added, in the court of chancery.[2] These improvements over 1427 allowed greater longevity for the work of the commissions and must have made their existence seem less fleeting in the locales to which they were assigned. The realization that drowned land could be made to turn a profit was slowly gaining hold; drainage was no longer simply a matter of temporary crises. Hence, the means to deal with them had taken a step closer to becoming lasting administrative fixtures. In 1532 this trend was still in an incipient phase; the final two sixteenth-century sewers statutes were required to bring it to full maturity.

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[1] 23 Hen. VIII, c.5-xv, xi. [2] Ibid., xii, xiv.

The last statutes to deal with sewers commissions *per se* were passed in 1549 and 1571.[1] Each constituted little more than an amendment or addition to 1532, but the alterations made were crucial to the vitality of the commissions. The first was conceived amid the turbulence of the late 1540s, years characterized by an inflation which ranks among the most severe in English history.[2] Contemporaries presumed a variety of evils to be causes of the inflation but the most popular target for public criticism was a paucity of tillage, attributed to large-scale conversions of arable land to pasture.[3] Another sore point was regrating--the hoarding of commodities with intent to resell at higher prices--which was thought to be an underlying reason for the dearth of victuals.[4] The government's official choice as major offender--enclosures--was that which was most convenient for the continued pursuit of its bellicose designs against Scotland. The presumption that the land was being depopulated threw a smokescreen over the true reason for a shortage of martial manpower--"the very size, ambitiousness and duration of the government's military commitments."[1] The 1549 sewers act has a demonstrable affiliation with these matters, and must be viewed within the total picture presented by the pressing economic conditions of the time.

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[1] 3/4 Edw. VI, c.8; 13 Eliz., c.9.

[2] M. L. Bush, The Government Policy of Protector Somerset (Montreal: McGill-Queen's University Press, 1975), p. 58.

[3] Elizabeth Lamond, ed., A Discourse of the Common Weal of this Realm of England (Cambridge: University Press, 1954), p. 15; Hughes and Larkin, Proclamations, 1:427-29.

[4] Lamond, Discourse, p. lxii; Hughes and Larkin, Proclamations 1:428.

The topics of sewers and enclosures have an especially close affinity, for they both relate to land and its availability to the common people. One might expect that, at a time of outcry against enclosures, in the appropriate localities a similar outcry over aspects of the sewers commissions would be no less vociferous. Indeed, we have evidence that this was the case in 1549. Robert Kett's rebels of Norfolk included in their list of demands grievances over areas which fell under the jurisdiction of the sewers commissions.[2] At a time when land and its use was a sensitive issue, one can easily see how the actions of the commissions would have repercussions in such an agitated area as East Anglia.

The association of sewers commissions with regrating was legislative. The initial bill for sewers of 1549 was a combined one, promoting continuances of the 1532 act and others ruling on the regrating of wool and the destruction of eel and salmon fry.[3] It was introduced in March, at the end of the second session of Edward's first parliament, and apparently it suffered a fate similar to the more famous bill against regrators of foodstuffs introduced by

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[1] Bush, Protector Somerset, pp. 58-60.

[2] H. E. S. Fisher and A. R. J. Jurica, eds., Documents in English Economic History, vol. 1: England from 1000 to 1760 (London: G. Bell and Sons, 1977), p. 35.

[3] Journals of the House of Commons, vol. 1 (London: 1803), p. 10.

John Hales.[1] While neither of these bills achieved the rank of statute, there was another attempt at a combined continuance for acts of sewers and regrators of wool in the third session. It was read and committed on 5 November, 1549, but made no further progress. Parliament must have deemed the sewers act worthy of individual attention, however, because later in the month a second and then a third attempt was made to introduce a bill. Both these efforts were devoted solely to the topic of sewers.[2] The last proved successful and the bill passed its third Commons reading on 3 December, 1549.[3] The perseverance shown by parliament in the passing of this statute, especially as it was primarily the continuance of an act with three years of life still remaining, implies the accordance of a certain priority to the sewers commissions. This might have been due to difficulties of statutory enforcement similar to those that moved Thomas Cromwell to issue his proclamation in the late 1530s. If malfunctioning sewers commissions were a cause of official concern in the 1530s, this must have been much more the case during the economic crises of the late 1540s.

Such a suggestion is supplemented by further indication that, over and above the tenacity already mentioned, the government took rather exceptional action to effect a solution to the problem. It has been noted that the parliamentary debut of the sewers bill in 1549 was as a proposed continuance of the 1532 act along with statutes on other topics. Comprehensive acts which continued groups of temporary acts were indeed a common practice of the period,[1] and so a deviation from the norm occurred when the issue of sewers was isolated for separate treatment.

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[1] Lamond, Discourse, pp. lxii-lxiii; G. R. Elton, "Reform and the 'Commonwealth-Men' of Edward VI's Reign," The English Commonwealth 1547-1640, ed. Peter Clark, A. G. R. Smith, and Nicholas Tyacke (Leicester: University Press, 1979), pp. 34-35.

[2] Commons Journals, 1:11. [3] Ibid., p. 12.

Parliament apparently relinquished the idea that repeated official utterances, either in the form of statute or proclamation, alone would make the sewers commissions more effective. Instead, they chose to expand upon the theme that was introduced tentatively in 1532, and continuity was awarded to the commissions in both a legislative and an administrative sense. The opening paragraph of the act commented that 23 Hen. VIII, c.5 "ys thoughte good and beneficiall for the Comon Wealthe of this Realme", and ordered that it "be observed and kept for ever".[2] Obviously, contemporaries did not place the blame for the problems of commissions on the 1532 statute itself; it was deemed more than adequate. In the realm of administrative pragmatics, greater longevity and stability were sought by extending the life of the sewers commissions from three to five years.[3]

If the 1549 statute enlarged upon the 1532 idea of giving permanence to the commissions, the 1571 act brought it to full maturity. It appears that once again the government was reacting to the pressures of circumstance. In November 1570, the worst North Sea storm recorded since 1250 caused flooding serious enough to bring about changes in the coastline.[1] A disaster of this magnitude could not be countered realistically by any government tactic other than the one used; the only practical recourse was to streamline and give more potence to the work of the sewers commissions. In addition to those of nature, other forces were cause for action.

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[1] R. W. K. Hinton, "The Decline of Parliamentary Government under Elizabeth I and the Early Stuarts," Cambridge Historical Journal 13(1957)):117.

[2] 3/4 Edw. VI, c.8-i. [3] Ibid., v.

By the latter half of the sixteenth century, the "essentially criminal procedures of presentment and fine" which served as due process in most cases of local administration, including that of the sewers commissions, were becoming increasingly overburdened. This was due in part to public harassment and litigation initiated by citizens who were "testing official action".[2] The machinery for the execution of those laws designed to keep the country running smoothly was, while not exactly breaking down, at least in need of oiling. This was reflected in Lord Keeper Sir Nicholas Bacon's outburst during the 1571 parliament against the commission of the peace, the body whose membership was most responsible for the task described above, for its negligence and ineptitude in carrying out its duties.[3] The operational malaise affecting the administrative structure must have taken its toll on the function of the sewers commissions, even if they were a less permanent part of that structure than the commission of the peace. There are intimations of discontent in Lincolnshire in the 1560s, specifically evidence of petitions which complained of undue assessments for diking in the soke of Bolingbroke. In August 1567, a "Great concourse of people" assembled at Boston, apparently agitated about a "suit . . . concerning sewers".[1]

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[1] H. H. Lamb, The English Climate (London: English Universities Press, 1964), p. 203.

[2] Edith Henderson, Foundations of English Administrative Law (Cambridge, Mass.: Harvard University Press, 1963), p. 18.

[3] J. E. Neale, Elizabeth I and Her Parliaments, 1559-1581. (London: Jonathan Cape, 1953), pp. 238-39.

The 1571 sewers statute strove to limit, to some extent, possible impediments faced by the commissions. First and foremost, the final step was taken in the extension of the life-terms of the individual commissions. Henceforth they were to stand for ten years.[2] On the whole, this would probably have reduced the number of occasions when commissions had to be re-issued and commissioners re-appointed. Ironically, the task of doing such was in at least one instance supplanted by that of having to replace elderly commissioners whose lives expired before their terms did. Lord Treasurer Burghley was asked to attend to this in 1588.[3]

Provision was also made for a longer period of endurance for the laws, decrees, and ordinances of the commissions. Prior to 1571, any of the above, with one exception, lost all legal force with the termination of the commission that had inspired them. The exception was decrees made against persons refusing to pay rates assessed by commissioners. If all else failed, their lands and hereditaments could be awarded to anyone willing to pay the assessed rate. The decree making such an award, if sealed by the commissioners, certified in chancery and given royal assent, would stand in perpetuity and could only be repealed by act of parliament.[4] This apart, after 1532 laws, decrees, and ordinances made by sewers commissions could only last for three years, and after 1549, for five. The Elizabethan statute increased their longevity and thus their effectiveness by a two-pronged approach to the matter.

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[1] CSP-Dom., 1547-80, pp. 292, 297. [2] 13 Eliz., c.9-i.

[3] CSP-Dom., 1581-90, p. 512. [4] 23 Hen. VIII, c.5-v.

On the one hand, it made a special case out of commissions cancelled by writ of *supersedeas*. The obtaining of this writ was one of the few legal tactics to which opponents of a commission had recourse if attempting to stop its work.[1] The statute took the sting out of this strategy by ruling that all laws, decrees, and ordinances of superseded commissions, if properly sealed and written on indented parchment with the separate copies deposited appropriately for safe-keeping, would stand in full force until either repealed or amended by a succeeding commission for the same locale.[2] Therefore, one could oust a commission from an area but its administrative decisions remained behind as reminders of its work.

The other instance dealt with by the statute was that of commissions which reached the conclusion of their ten year term. The enactments of these commissions were to survive them for one full year, again provided that they were sealed on indented parchment and placed for posterity in the prescribed hands. The statute stridently declared that certification in chancery and royal assent were not requisite in either situation.[3]

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[1] 23 Hen. VIII, c.5-xi. *Supersedeas* was a "writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands." Black, Law Dictionary, p. 1607. In the case of sewers commissions, writs of *supersedeas* were to be issued at the king's pleasure out of the court of chancery.

[2] 13 Eliz., c.9-i. [3] Ibid., ii.

Another clause in the 1571 statute further abetted the streamlining project. The commissioners were to some degree unfettered from legal harassment by the stipulation that they were not to have "any Fyne, Payne or Amerciament set upon them . . . or anye wayes to be molested in Body, Landes, or Goodes for that Cause."[1] The events of the seventeenth century were to prove the necessity and, in part, the futility of this proviso.

Finally, perhaps the most significant upshot of the 1571 statute--at least pertaining to the prestige of the sewers commissions--was the establishment of a formal link with the commission of the peace. This was done by conferring upon six justices of the peace from the area in concern, including two members of the quorum, the responsibility of executing the "Lawes, Ordynaunces and Constitutions" of an expired sewers commission, "as fully and in an ample maner and fourme as the Commissioners . . . might or should have done to all intentes and purposes as yf the said Comission or Commissions had continued in force." Their authority in this sphere was to last one year past the termination of a sewers commission, unless, of course, a new commission was issued in the interim.[2] Like the superseded commissions, those that had been terminated were also given a means of extending their effect beyond the time of their existence. Most important of all, a mantle of stability, permanence, and respectability had been settled upon the commission of sewers by its association with the justices of the peace. Apart from a 1546 proclamation (#270) which inexplicably called the court of sewers one of "his highness' honorable courts at Westminster", also including it in a list of the great central courts,[1] the 1571 act is the first indication that the sewers commissions had taken a place within the solid administrative structure that oversaw the daily routine of English local government.

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[1] 13 Eliz., c.9-v. [2] Ibid., ii.

The statute was passed on 24 May, 1571,[2] and it seems to have slipped into anonymity with great ease. The parliamentary diarist Sir Simonds D'Ewes made no specific reference to it, although he did find evidence of the reading of "four bills of no great moment" on Saturday, 24 May, one of which was possibly the sewers statute.[3] Nevertheless, the inclusion of the statute among the myriad of others that came under the jurisdiction of the j.p.s did not escape the attention of that author of the "justice's handbook", William Lambarde. Himself a sometime sewers commissioner,[4] it is understandable that in his list of "what thinges, three, or moe, Justices of the Peace may do out of the session", he would not overlook their duties in the realm of sewers.[5] Michael Dalton's 1619 handbook, devoted to the "practice of the Justices of the Peace out of their Sessions", demarcated not only the j.p.s' area of responsibility with respect to sewers, but also listed a number of legal decisions which defined to a certain extent the powers of the sewers commission itself.[1] Professor W. S. Holdsworth included "powers in relation to . . . sewers" under those of three or more justices.[2] Clearly, the Elizabethan sewers statute above all others helped to secure for the sewers commissions a recognizable stature within that greater legal framework, founded not so much upon the commission of the peace but upon those versatile men of which it consisted.

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[1] Hughes and Larkin, Proclamations, 1:371.

[2] Commons Journals, 1:92.

[3] Sir Simonds D'Ewes, ed., The Journals of All the Parliaments during the Reign of Queen Elizabeth (London: 1682; reprint ed., Shannon, Ire.: Irish University Press, 1973), p. 214.

[4] Gleason, Justices of the Peace, p. 9.

[5] William Lambarde, Eirenarcha (London: 1581; reprint ed., London: Professional Books Limited, 1972), pp. 273-75.

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[1] Michael Dalton, The Countrey Justice (London: 1619; reprint ed., London: Professional Books Limited, 1973), pp. 118-20.

[2] Holdsworth, HEL, 4:142.

# CHAPTER IV

# THE SEWERS COMMISSIONS

## i. Composition

The statutes provide the necessary foundation for an examination of the sewers commissions themselves, the extent of their jurisdiction, the mechanics of their operation, and the ramifications of their activity.

Professor Barnes has classified commissions of sewers, along with the commissions of subsidies and charitable uses, as supplementary to the commission of the peace.[1] Indeed, the affinity between the latter and the commissions of sewers has already been stressed.[2] Within the realm of his own study, Professor Barnes has offered ample evidence of this connection, along with that for the association between sewers and those other special commissions named.[3] Robert Callis, however, accorded the sewers commissions a more distinct and reverent treatment, proudly proclaiming them unique as compared to others like the commissions of bankruptcy or charitable uses.[4] He asserted that these were "all of them rather Ministerial than Judicial Commissions", meaning that, unlike the commission of sewers,

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[1] supra, p. 5. [2] supra, pp. 66-68.

[3] Barnes, Somerset, p. 145-50.

[4] Callis, pp. 163-65. Callis began his argument by stating, "I am desirous to attribute to this Law all the honour and dignity which may in sort belong to it".

"a Court is not proper to them". Sewers commissions, on the other hand, were more than administrative bodies. Callis considered them an "eminent Court of Record", and this was supported by the Tudor proclamation (#270) which spoke of the "court" of sewers in the same breath as the central courts of Westminster.[1]

Sidney and Beatrice Webb described the sewers commissions as combining "judicial, executive and even legislative powers, all exercised under the forms of a Court of justice."[2] Professor Darby concurred with this assessment in his own account of the commissions,[3] and the latest summary of their powers, by Professor Edith Henderson, acknowledges that "although to modern eyes they look much like a true administrative agency" the sewers commissions were "always considered a court of record".[4] Thus, the consensus is that the sewers commissions had powers transcending those of an administrative body. As we shall see, they constituted a judicial and legislative force of no mean consequence.

A fitting starting point for an investigation of sewers commissions is to examine the terms of their promulgation: who issued them and to whom were they issued. The public officials responsible were the lord chancellor, the lord treasurer and the two chief justices. They were required to act as a group in the granting of commissions, but the quorum was three and had always to include the lord chancellor.

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[1] Callis, pp. 163-65; supra, p. 66.

[2] Webb and Webb, Statutory Authorities, p. 21.

[3] Darby, Draining of the Fens, p. 4.

[4] Henderson, Administrative Law, pp. 28-29.

If the area lay within the duchy of Lancaster, the principality of Wales, or one of the counties palatine, the appropriate chief official was to be included as a member of the quorum.[1] The fact that these men were often distant from London, combined with the apparent necessity of their presence in concert with the lord chancellor, must have made the issuing of commissions for special areas somewhat difficult.

As for contemporary legal opinion, both Sir Edward Coke and Robert Callis simply repeated the wording of the statute as it applied to the issuing of commissions.[2] However, the latter added his own comment on the practice of the time, stating that because those persons named above were "most commonly busied in matters of great importance, they many times refer these matters to others". According to Callis, this resulted in unqualified persons gaining places on the commission.[3]

While this sounds quite plausible, there is little in the way of conclusive evidence on the subject. The few letters available, which consist of requests concerning the appointment of commissioners directed to Lord Treasurer Burghley in 1588 and Lord Chancellor Ellesmere in 1607 and 1617, tend to refute Callis.[4] Lord Chancellor Bacon's procedural orders of 1619 also corroborate the existence of a responsible practice in the selection of commissioners, even though they were a departure from the course prescribed by statute. The names of aspirants to the commission were to be submitted to the lord chancellor whereupon he would give them for perusal to justices of assize, the lord lieutenant, or a privy councillor from or familiar with the designated county. After these knowledgeable and dependable individuals had remarked on the merits of the respective candidates, the lord chancellor would make a final decision.[1] Mary Kirkus' findings for Lincolnshire lend support to the theory that such precautions generally prevented the installing of ineligible commissioners, at least in the sixteenth century.[2] However, Callis' criticisms, uttered in 1622 and referring to "late years",[3] should be given some credence, if only because his personal experience as a sewers commissioner would have exposed him to any existing irregularities. Furthermore, the inclusion in the statutes of penalties for unqualified men who sat on the commission is another indication that the selection process was not always expected to achieve its desired end.

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[1] 23 Hen. VIII, c.5-i, ix, xiii.

[2] Coke, 4 Institute, p. 275; Callis, p. 225.

[3] Callis, p. 225.

[4] CSP-Dom., 1581-90, p. 512; HMC Salisbury, 19:222; APC, 1616-17, p. 140.

If the statutes were clear as to who could issue commissions and appoint commissioners, they were also for the most part precise as to who was qualified to serve. Persons to be considered were those "havying landes and tenementes or other hereditamentes in fee symple fee taile or for terme of liff to the clere yerely value of xl. markes above all charges to [their] owne use". The only exceptions were free residents of corporate cities, boroughs, or towns who had "moveable substaunce" worth ₤100, and any utter barrister of the four Inns of Court.[1] The 1534 statute dictated that no man could serve on a sewers commission unless "he be dwellyng within the Countie" for which it was issued.[2]

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[1] G. W. Sanders, Orders of the High Court of Chancery (London: 1845), 1-pt. 1:121.

[2] Kirkus, pp. xxiv-xxv. [3] Callis, p. 225.

Any confusion about qualifications originates with the 1571 statute. Two abstruse clauses appeared to eliminate the standards set in 1532 and thus led Mary Kirkus to assume that the statute had raised property qualifications for commissioners.[3] In truth these clauses were just dealing with special cases. The first enacted that a "Farmer . . . for Tearme of yeres", whose rented lands were subject to the decrees of a sewers commission, could not serve on the commission unless he held property in freehold elsewhere to the annual value of ₤40.[4] The second clause, which was annexed to the statute in a separate schedule,[5] conceded that a farmer or lessee without a ₤40 freehold elsewhere could sit on a commission and "have his voyce and full aucthoritie with others, to make and establish Ordynaunces for Sewers" as long as those ordinances did not concern the lands he was renting.[6] Neither of these provisions changed in any way the original demands of 1532; a sewers commissioners still required holdings worth 40 marks a year, in either fee simple, fee tail, or term of life. The 1571 clauses, although expressed in negative terms and apparently restrictive, actually removed ostensible limitations by clarifying possible misconceptions arising from the 1532 statute. They showed that being a renter did not disqualify one from the sewers commissions, as long as one had the necessary properties somewhere in England. Furthermore, if one had achieved a slightly higher ownership level than that deemed basic for sewers commissions, one could even rule as a commissioner on the lands one was renting. These terms did not abrogate the residency requirement established in 1534. If they seem to call for lax interpretation of that statute, it should be pointed out that members of the landed class who owned or operated numerous estates often maintained homes on several of them, and were most likely considered to be 'dwelling' in each one.

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[1] 23 Hen. VIII, c.5-vii. [2] 25 Hen. VIII, c.10-i.

[3] Kirkus, p. xxiv. [4] 13 Eliz., c.9-iv.

[5] Statutes of the Realm, 4-pt. 1:544. [6] 13 Eliz., c.9-vii.

The standards by which potential members of the sewers commissions were measured loom large when compared to those of other commissions. Examples that Robert Callis found convenient when putting the sewers commissions into perspective were the commissions of bankruptcy and charitable uses. In the case of the former, it appears that no exact criteria for the selection of commissioners existed. Instead, choices were made on general grounds and men who were "familiar with the debtor, his holdings, worth and trade" were sought.[1] The commissions for charitable uses had only the basic requirement that the diocesan bishop be a member, and were merely exclusive of those who "pretended title to property alleged to be held to a charitable use."[2] This is not to suggest that seats on these commissions were open to all comers. There was a select group of men who performed all the administrative and judicial functions within each county and, as Professor Barnes found for Caroline Somerset, the same individuals could often be found serving on commissions of sewers and charitable uses, as well as the commission of the peace.[1] Still, the qualifications for the sewers commissions were more demanding and specific. Even membership of the commission of the peace only required land holdings to the value of £20 yearly. Admittedly, by the second half of the sixteenth century this stipulation for j.p.s was considered anachronistic and greater expectations were held of prospective justices.[2] Nevertheless, the sewers commissions, by reason of more up-to-date legislation, had definite standards for selection.

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[1] W. J. Jones, "The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period," Transactions of the American Philosophical Society 69-pt. 3(July, 1979):25.

[2] Gareth Jones, History of the Law of Charity, 1532-1827 (Cambridge: University Press, 1969), p. 40.

Specific qualifications aside, the commissioners of sewers were chosen from the same social group, the local gentry, as were the justices of the peace.[3] Professor Barnes ascertained that in Somerset this applied to such an extent that "in practice, the commissioners of sewers were indistinguishable from the justices." He estimated that one-half the commissioners were justices, while three-quarters of the justices were commissioners.[4] In spite of this common ground, there is some evidence that men who were not considered 'proper' for the commission of the peace might still suffice for the sewers commission. Nicholas Hare of Norfolk was discharged from his duties as a j.p. in 1587, for being "backward in religion", but continued to serve on the commission of sewers.[1]

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[1] Barnes, Somerset, pp. 146-48.

[2] Gleason, Justices of the Peace, pp. 47-48.

[3] Henderson, Administrative Law, p. 28.

[4] Barnes, Somerset, p. 148.

Further speculation on the make-up of the sewers commissions is prompted by Professor Barnes' discovery that for Somerset the working commissioners were the j.p.s.[2] If the justices constituted the active portion of the commission, yet only half of the commissioners were justices, then a large percentage of the commission membership may well not have been involved in its operation. A major reason for this could be that many appointments were simply titular. In his study of bankruptcy in the early modern period, Professor W. J. Jones mentioned the custom of naming "worthy" men as dormant members of a commission in order to endow it with greater "credit".[3] Similar practice may also have existed in the case of the sewers commissions.

Another consideration taken in the appointment of sewers commissioners was their proximity to the area under the commission's jurisdiction. Statute demanded that a commissioner be dwelling in the county for which the commission was issued. However, the possible exceptions to this rule have been mentioned above, and even if a commissioner did live within the county his residence could be a substantial distance from the region in question. In the fens of the eastern counties, where the greatest need for the commissions prevailed, a few miles could be as difficult for the seventeenth-century man to traverse as many hundred are today. This is well illustrated by William Camden's contemporary description. "All this

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[1] Lansdowne MS 121, f. 51, f. 65. [2] Barnes, Somerset, p. 148.

[3] W. J. Jones, "English Bankruptcy," p. 25.

Country in the winter-time, and sometimes for the greatest part of the year, is laid under-water by the rivers Ouse, Grant, Nen, Welland, Glene, and Witham, for want of sufficient passages." The inhabitants of the area were forced to transport themselves under these conditions by "Walking a loft upon a sort of stilts".[1] One can see the sense in the request made of Lord Ellesmere in 1607 to take into account the situation of individual abodes in forming a sewers commission, so that the commission would be properly executed.[2]

Those commissioners who were only considered to 'dwell' in a county on a technicality must also have posed a problem. A case in point is that of Sir Henry Spelman, noted member of parliament and gentleman-cum-antiquarian of Norfolk. After having established himself as a solid member of the Norfolk gentry over a number of years, he removed himself and his family to London in 1612, in order to pursue his ambitions as a scholar. He leased out his holdings in Norfolk but continued to serve on the commission of the peace there.[3] Not only did Sir Henry endeavour to do the work of a j.p. from afar, in 1613-14 he served on the commission of sewers for the district of Marshland and the town of Terrington within his native county.[4] To give some idea of his travel requirements, the trip from London to Lincolnshire during the early seventeenth century took three days on horseback, when the roads were dry and passable; and they often were not. An Elizabethan traveller lamented that "the ways to Grantham

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[1] William Camden, Britannia (London: Edmund Gibson, 1695), p. 408.

[2] HMC Salisbury, 19:222. [3] DNB, 18:737.

[4] APC, 1613-14, pp. 265, 382.

[in southwest Lincolnshire] were foul and long".[1] Terrington is on the southeastern corner of the Wash, and thus nearer London, but Sir Henry could not have experienced passage of a noticeably easier variety, especially since his destination was well within the fenland. More than likely, when winter flooding required the presence of sewers commissioners in Marshland, this scholarly gentleman was comfortably ensconced with his books in London, leaving his colleagues who actually resided in Norfolk to brave the storms and the "brutish unciviliz'd tempers" of the fen people.[2]

There is no direct evidence of the culpability of Sir Henry Spelman in this matter. Nevertheless, it is obvious that some sewers commissioners were delinquent in their duty, because there are letters to various groups of commissioners censuring them for their refusal to obey directions and exhorting them to pursue their work with greater diligence.[3] There were disciplinary measures prescribed by statute concerning sewers commissioners but they were not of much consequence for those already on the commission. The 1534 statute recognized a problem in that "dyvers comissions heretofore made remayne hitherto without effectuall execucion." It placed the blame with men who, when appointed to the commission, refused to be sworn in. The fine for this was set at 5 marks, to be levied as many times as the individual refused to take the oath, unless he could give reason to the lord chancellor for an inability to serve on the commission.[1]

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[1] J. W. F. Hill, Tudor and Stuart Lincoln (Cambridge: University Press, 1956), pp. 1-2.

[2] Camden, Britannia, p. 408.

[3] APC, 1601-4, p. 404; Ibid., 1621-23, p. 510.

Statute also made provision for those who sat "by vertue of any of the said Comissions" while not sworn in or properly qualified to do so. Procedure to be taken in this eventuality was described in great detail. First, suit had to be brought against the alleged *poseur* in "any of the Kynges Courtes".[2] The legal experts who edited Callis' reading defined this to mean the "four ordinary Courts at Westminster", (the courts of king's bench, common pleas, exchequer, and chancery), and not "any inferior Court".[3] The statute specified that the suit had to be initiated by action of debt, bill, plaint or information.[4] Finally, recourse to essoin or wager of law by the defendant was prohibited. If a verdict of guilty was handed down, the *poseur* was to be fined £40, half payable to the king and half to the instigator of the proceedings.[5] The opportunity and incentive here furnished for the harassment of legitimate sewers commissioners was all too obvious.

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[1] 25 Hen. VIII, c.10-ii. [2] 23 Hen. VIII, c.5-vii.

[3] Callis, pp. 248-49. In Callis' time, the court of star chamber would have been included amongst the Westminster courts.

[4] 23 Hen. VIII, c.5-vii.

[5] 23 Hen. VIII, c.5. Information, action of debt, bill or original action, and plaint are all written forms of making known the cause of a plaintiff's action before a judge. Their common ground is that they are the means by which an individual prosecutor may proceed, as opposed to an indictment which is the work of a jury. Essoin was the occasionally allowable tactic of presenting an excuse through a third party for not appearing in court on an appointed day in response to a summons or for the return of process. Wager of law was the giving of surety by a defendant in an action of debt that he would take oath and provide oaths by eleven others to the effect that he did not owe the debt. Black, Law Dictionary, pp. 207, 642, 918-19, 1750.

### ii. Jurisdiction: Navigation

The statutory definition of the composition of the sewers commissions was far less complex than that demarcating the watery domain over which they ruled. The latter was tortuous and made use of unfamiliar terminology. The commissions were responsible for

> . . . the walles, diches, bankes, guttures, sewers, gootes, calceis, bridges, stremes, and other defenses by the costs of the See and Marsshe grounde lieng and beyng within the limittes of [a specified area of a county or counties] . . . and also the comon passages for Shippes, balengers, and botes in the rivers, streames, and other fluddes within the limittes of [a specified area of a county or counties], which by meane of setting up, erecting, and making of stremes, milnes, bridges, pondes, fisshe garthes, mildammes, lokkes, habbyng weares, heckes, and fludgates or other like lettes, impedimentes or anoysaunces be letted and interrupted . . . .[1]

Put quite simply by Callis, "this Statute [23 Hen. VIII, c.5] makes but two uses of Rivers, Sewers and Streams, the one for draining, the other for sailing".[2] While this rendition was true in the widest sense, it paid little heed to the added statutory stipulation about "lets and impediments", nor to the nuances of interpretation recognized by a later act, that for London watercourses in 1606.[3] This was not a general statute for sewers and so does not merit the treatment accorded the others that have already been discussed within their historical context. Nevertheless, inherent in its preamble is the implication that some questions of jurisdiction were not completely covered in 1532.

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[1] 23 Hen. VIII, c.5-i. Although most of these words are easily identifiable parts of modern English vocabulary, the meanings of some have become obscured in time, or their spelling has changed so drastically that they are no longer recognizable. From Callis' description of "calceis", (p. 90) we can see that they are nothing more than causeways. "Gootes" or "goats" according to Callis were "Engines erected and built with Percullasses and Doors of Timber, Stone or Brick" which controlled drainage and aided in the flow of run-off to the sea. (p. 91) "Habbyng weres" were devices for catching fish in running water, as were "fisshe garthes", both simply special kinds of weirs. "Heckes" were also fish-catching mechanisms but apparently this term was unique to the River Ouse. Black, Law Dictionary, pp. 765, 853.

[2] Callis, p. 84. [3] 3 Jac. I, c.14.

The 1606 statute contains allusions to both of the types of watercourse mentioned in 1532: those which served a defensive purpose and those which constituted thoroughfares for water traffic. For purposes of discussion we will deal with the latter first. The 1532 statute calls them "the comon passages for Shippes" which "be letted and interrupted". In 1606 a more detailed description was given of what, for legal purposes, was the same basic sort of watercourse: "those Rivers Streames and Watercourses where the Water dothe usually ebbe and flowe, and where more usuall passage of Boates hath bene". However, it was admitted that certain of these were

> . . . not under the Survey Correccon and Amendment of the Comission of Sewers, nor of the Statute made for Sewers in the three and twentieth yeare of the Raigne of King Henrie the Eight, or of any other Statute made for Sewers, as by the same should have beene if the Hurtes Noyances and Inconveniences now by daylie Experience felt and found in those places had beene seene and considered of . . . .[1]

The 1532 statute spoke of "comon passages for Shippes" which were "letted and interrupted" *at that time* as being under the aegis of the sewers commissions. However, it did not make provision for those "comon passages for Shippes" which would become "letted and interrupted" *in the future*. The 1606 statute acknowledged this by allowing that there were "comon passages for Shippes" which did not fall within the jurisdiction of the sewers commissions, but which would have had they been in the same deteriorated condition in 1532 as they eventually became by 1606. The statute then proceeded to rectify this situation, but only for waterways having their "Course and Fall into the River of Thames"and "within the limits of two miles of and from the Citie of London".[1] Why this extension of jurisdiction for sewers commissions was not granted for the entire realm is not known.

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[1] 3 Jac. I, c.14.

Professor Conrad Russell has observed that "in 1606, there was concern about the discharge of sewage on to the banks of the Thames between London and Westminster." By his account, the sewage was making its noxious presence felt in an area where the sewers commissions had no control, and so the statute was passed, enabling the commissions to effect the withdrawal of offensive odors from the olefactory range of London gentlemen.[2] He has cited nothing but the statute itself in support of this claim, and for a number of reasons it must be considered specious. First of all, the stench of the Thames was most probably a cross long borne by Londoners; it is doubtful that it would suddenly become an issue for parliament in 1606. Secondly, no mention whatsoever is made of sewage in the statute. To the contrary, the evidence presented above shows that much of the language of the act was devoted to watercourses which were passable for boats. Finally, Professor Russell stated that the sewage in question was being deposited "below

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[1] 3 Jac. I, c.14.

[2] Conrad Russell, Parliaments and English Politics, 1621-1629 (Oxford: Clarendon Press, 1979), pp. 35-36.

high-tide mark in an area not under the jurisdiction of the comissioners".[1] If the sewage was below a high-tide mark, it must have been in a tidal portion of the river. It is highly unlikely that such a segment of the Thames would not already have been considered 'navigable' in 1532 and hence, well within the jurisdiction of the sewers commissions.[2]

London was an almost separate political and economic entity within the larger whole of seventeenth-century England. It would have been subject to an infinitely greater amount of change and development since 1532 than the low-lying rural areas for which the statute of sewers was primarily enacted. Due to city expansion and commercial necessity, many Thames tributaries which would not have come under sewers jurisdiction in 1532, might by 1606 have become useful passages for water transport and thus needed maintenance and regulation by the sewers commissions. This is merely an undocumented suggestion. However, when one considers the eccentric status occupied by London in the eyes of the government and the many special standards that applied to it, the possibility that another had been created in the realm of sewers is not far-fetched.

Of greater significance than the simple fact of the 1606 statute regarding London, is the implicit deference it paid to riparian law and its resultant effect on the sewers commissions. Riparian law is that which pertains to rivers, and the proprietary rights of those who own land adjoining rivers. There are two fundamental tenets of riparian law germane to the sewers commissions. First, all tidal and navigable rivers belonged to the crown, were given the same status as public thoroughfares, and were subject to the laws governing such, including those enacted by the sewers commissions. For non-navigable and non-tidal rivers, or the non-tidal portions of rivers falling into the sea, the converse was true. These waters were owned and controlled privately by those who held rights to the land which bordered them.[1]

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[1] Russell, Parliaments, 1621-1629, pp. 35-36.

[2] For the specific meaning of the word 'navigable' see infra, p. 84.

Secondly, a navigable river was not merely any river that was passable, there were exact legal boundaries defining what constituted a navigable or public river. It could be so by prescription. This would apply to "waters . . . where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary."[2] Unfortunately, prescriptive rights were often a matter of debate. Stronger *prima facie* grounds for the case that a river was navigable, and thus in the public domain, could be found in acts of parliament or letters patent which granted rights of passage over previously private waterways.[3]

The 1532 description of the rivers over which the sewers commissions had jurisdiction referred simply to "common passages for

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[1] T. S. Willan, River Navigation in England 1600-1750 (London: Frank Cass & Co., 1964), p. 22.

[2] Humphrey Woolrych, A Treatise of the Law of Waters (London: William Benning & Co., 1851), p. 40.

[3] Willan, River Navigation, p. 22; C. W. Chalklin, "Navigation Schemes on the Upper Medway, 1600-1665," Journal of Transport History 5(1961):109.

Shippes". This in itself implies strongly enough that the statute was speaking of navigable rivers, but the 1606 act removes all doubt: "Those Rivers Streames and Watercourses where the Water dothe usually ebbe and flowe, and where more usuall passage of Boates hath bene". It becomes obvious that the authority of the sewers commissions where navigation was concerned applied only to public and navigable rivers. They could not create navigable rivers out of those that were not already recognized as such. Robert Callis held this to be true, but with the qualification that, while man-made devices within a private river were also private property and therefore untouchable, commissioners could alter a private riverbed (*i.e.* by dredging) if that by itself would expedite navigation.[1]

Callis' conclusion was based on the rather questionable strength of a phrase taken out of context from the statute which read: "to cleanse and purge the trenches sewers and diches in all places necessarie".[2] There is some doubt as to whether this was applicable to bodies of water that were able to carry boats. Details of fluvial ownership provided by Serjeant Humphrey Woolrych tend to contradict Callis' opinion. The former declared that the "soil beneath rivers which are not navigable, belongs . . . to the owners of the land on either side."[3] Albeit Woolrych's views were of the nineteenth century, if they were to be taken over Callis', one would have to conclude that for purposes of navigational enhancement a private riverbed was as inviolable as those devices standing in or on the river and its boundaries.

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[1] Callis, p. 270. [2] Ibid.

[3] Woolrych, Treatise, p. 46.

If demarcation of the sewers commissions as they pertained to public and private rivers seems confusing and hairsplitting, the actual practice of the commissioners indicated a certain bewilderment on their part (whether feigned or real) as to the true extent of their jurisdiction in this area. The early decades of the seventeenth century constitute a period during which the commissioners strained at the proverbial leash, and on several noteworthy occasions sought to overstep the bounds of their authority. Perhaps not the most celebrated, but conceivably the most classic, dispute arose over portions of the River Medway in Kent.

This late-Elizabethan conflict was exacerbated by the involvement of political faction, the adversaries boasting connections that soared above and beyond the local elite to the Olympian heights of the privy council. As one might expect, there was much serving of private interest, but the division was drawn conveniently along the same party lines that split the Elizabethan court and caused so much of the political infighting characteristic of the time. Lord Treasurer Buckhurst entered the lists as champion of Sir Robert Cecil's coterie. Opposed to them were members of the splinter group headed by Henry, Lord Cobham and Sir Walter Raleigh, who had formerly been allies of Cecil.[1] Stripped of its political implications, the matter boiled down to a two-pronged assault on the Medway by the sewers commissions when legally they were only entitled to a presence in one capacity.

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[1] Peter Clark, English Provincial Society from the Reformation to the Revolution: Religion, Politics and Society in Kent 1500-1640 (Sussex: The Harvester Press, 1977), p. 263.

In the 1580s and 'nineties, the commissioners had attempted on several occassions to alleviate severe flooding on the river between Maidstone and Tonbridge by scouring its channel and removing weirs. Each time they were frustrated by landowners above Maidstone in the Yalding area, who replaced the weirs which succoured their fisheries. In 1600 a renewed attempt to remove obstructions met with further and more animated opposition from the Yalding landowners.

They claimed that the sewers commissioners were not only trying to enhance drainage, but were also trying to make the river navigable. This charge becomes more significant in view of the fact that the commission membership included Francis Fane,[1] Thomas Waller, and Sir John Leveson. These men were the leaders of a group who owned ironworks and timber rights along the Medway upstream from Yalding, and whose enterprise could only benefit from cheap river transport of commodities downstream to the Thames and on to London. The Yalding landowners, represented by Sir John Scott, appealed to their ally Buckhurst, who in consultation with Lord Admiral Howard called a halt to the work of the commission and set 21 August, 1600, as the date for a meeting to air grievances between factions. The pro-navigation group in turn approached the lord chamberlain, Lord Hunsdon, who shared their personal motivation for seeing the river made navigable. Hunsdon exerted his influence and brought Buckhurst and Howard to a more favourable view of the commissioners' cause, but the commissioners did not follow up this gain and the meeting on 21 August never came to pass. Instead, the commissioners met with Sir John Scott and concessions were made by both parties. Scott and the Yalding group conceded that the commissioners could and should attempt the mitigation of flooding by the removal of obstructions from the riverbed, including weirs as as natural obstacles. For their part, the commissioners abandoned their designs to make the Medway navigable above Maidstone.[1]

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[1] infra, p. 149.

The most celebrated case involving the sewers commissions *vis-a-vis* rivers is that of the Chester mills on the River Dee. Professor T. S. Willan cited it as an example, along with the Medway controversy, of the ineffectiveness of the commissions in dealing with river navigation.[2] A review of the details of the case may cast some doubt on the judiciousness of Professor Willan's selection of the Dee incident as ammunition for his argument. Mills had been in existence on the Dee above Chester since the eleventh century and by the early seventeenth century there were eleven of them, the majority for grinding corn but some serving the clothing industry and providing a water supply for the city. They employed a substantial number of people and played an important role in the economy of Chester.[3]

In July 1607, a commission of sewers was issued with a two-fold purpose: "to prevent flooding and improve navigation" of the Dee.[4]

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[1] Chalklin, "Upper Medway," pp. 108-9.

[2] Willan, River Navigation, p. 16.

[3] Thomas Cann Hughes, "The Dee Mills and the 'Miller of the Dee'," Bygone Cheshire, ed. William Andrews (Chester: Phillipson and Golder, 1895), pp. 99-101; Willan, River Navigation, p. 18.

[4] Willan, River Navigation, p. 18.

One of the steps deemed requisite and decreed by the commissioners was the breaching of a causey which had been constructed prior to the reign of Edward I and which was of fundamental value in the operation of the mills.[1] This was partly inspired and wholly approved by upstream landowners in the counties bordering the river (Denbigh, Flint and Cheshire) who held the mills and the causey to blame for their flooded land.[2] The city of Chester reacted by petitioning Lord Chancellor Ellesmere in October 1607 for a writ of *supersedeas* to be issued against this commission whose decrees threatened its livelihood.[3] The privy council submitted the matter to the consideration of Sir Thomas Fleming, chief justice of the king's bench, Sir Edward Coke, chief justice of the common pleas, and Lawrence Tanfield, chief baron of the exchequer.[4]

In June 1609, as a consequence of the judges' report, the council voided the commissioners' decrees.[5] However, this action was in no way based on alleged attempts by the commissioners to make the river navigable. River navigation as an issue did not enter into the findings of the justices. Instead, they ruled that the commissioners were in contravention of a 1351 statute[6] which provided that only

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[1] 10 Co. Rep., 138a.

[2] Willan, River Navigation, pp. 18-19; Hughes, "Dee Mills," p. 102.

[3] Margaret J. Groombridge, ed., Calendar of Chester City Council Minutes, 1603-1642 (Record Society of Lancashire and Cheshire: 1956), pp. 33-34.

[4] Willan, River Navigation, p. 20.

[5] Groombridge, Calendar, p. 34n.

[3] 25 Edw. III, c.4.

"mills, millstanks and causeys . . . which were levied or erected in the reign of Ed. I or after" could be "put down or abated".[1] Those erected before that time could only be altered if, since then, "they had been raised and exalted beyond their former altitude, and thereby made more prejudicial; in which case they are not to be thrown down or over-turned but to be reformed by the abatement of the excess and inhansement only."[2]

An interesting footnote to this affair lies in the fact that although the sewers commissioners for the Dee were unequivocally thwarted in 1609, they apparently did not capitulate without a struggle. Roughly one year after the commission's decrees were nullified, a letter was written by the mayor and citizens of Chester entreating the sixteen year old Prince Henry, soon to become earl of Chester, to intervene on their behalf against certain sewers commissioners who were still trying to have the causey dismantled.[3] In 1617, Robert Whitby, whose son had acquired an interest in the mills through marriage, petitioned Lord Chancellor Ellesmere to restrain persons advocating the destruction of the causey.[4]

The upshot of the Dee case was indeed a frustration of the aspirations of the sewers commissioners, but this setback cannot have held the general implications ascribed to it by Professor Willan. It was founded upon a legal technicality germane only to the causey on the River Dee and any others that had been erected prior to the reign of Edward I. It is hard to see how conclusions on any basis broader than the preceding one can be drawn with respect to the jurisdiction of the commissions, especially in relation to river navigation.

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[1] 10 Co. Rep., 138a. [2] Ibid., 138b.

[3] HMC Salisbury, 21:222.

[4] Bridgewater and Ellesmere MSS, 398.

In contrast, the Medway navigation dispute, although it did not produce hard and fast legal precedent, nevertheless established a basis for procedure that concurred with statutory theory and gave grounds for wider interpretation and application. The point to be taken from the Medway dispute is that eventually the sewers commissioners voluntarily abdicated their self-assumed right to make a non-navigable portion of a river navigable. By so doing they seemed to acknowledge that they had been in error. Equally important is the fact that the riparian owners of this private section of river voluntarily accorded the sewers commissioners full authority to make the decrees necessary for the enhancement of drainage and flood control. In this instance, there was an overt recognition by the protagonists of the distinct division between the two parts of the commissioners' jurisdiction. In the realm of river navigation they had one kind of authority, of a rather limited ilk that was readily and somewhat easily contested. In the realm of drainage their authority was, as we shall see, bolstered by more effective powers, and although challenged, more able to withstand the rigours of litigation and generally virulent opposition.

Mr. C. W. Chalklin has asserted that the powers of the sewers commissions "did not properly extend to river navigation".[1] There is perhaps greater merit in Professor Willan's version of what is basically the same assessment--that the commissions were "ill fitted" for the "creation of navigable passages".[1] The sewers statutes and tenets of riparian law make it patently obvious that the commissions were never intended for such a purpose. This is most apparent from the chronological stipulation of the 1532 statute, as it stood confirmed by that of 1606, and the fact that no sewers statute had ever exempted the commissions from the law which put private rivers beyond their reach. Seen in this light, it is small wonder that the sewers commissions were "ill-fitted" for the "creation of navigable passages".

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[1] Chalklin, "Upper Medway," p. 105.

On the positive side, the commissions did have jurisdiction over public and navigable rivers. The contribution they made toward the improvement of the River Lea is ample evidence of the respect given to their authority over this category of river. Long a key avenue of transport to London, the Lea became increasingly important to city industry in the latter half of the sixteenth century, especially after the 1571 act of parliament which made it navigable as far upstream as Ware.[2] The sewers commissions duly exercised their command over navigation, making decrees and ordinances in 1576 and 1577.[3] In the 1590s a dispute arose over the rights of certain parties to make use of the waterway for their own ends,[4] and a case was referred to chief justice Sir John Popham at Serjeant's Inn in

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[1] Willan, River Navigation, p. 23.

[2] W. R. Powell, ed., The Victoria History of the Counties of England: A History of County of Essex (London: Institute of Historical Research, 1966), 5:166.

[3] CSP-Dom., 1547-80, pp. 529, 539. [4] VCH Essex, 5:166.

1594.[1] At this hearing, full and unquestioned acknowledgement was made of the role played by the commissioners in maintaining and enhancing navigation of the Lea.[2] Indeed, the presence of the commissions on the river was sustained into the seventeenth century.[3] From this example it can be deduced that the sewers commissions did have a legitimate association with river navigation. Where they had statutory justification for involvement they performed their duties capably. Their function appears to have been one of maintenance, perhaps preservation of the *status quo*, rather than innovation and creation, and it seems that they were quite properly equipped to serve that purpose.

### iii. Jurisdiction: Drainage

Callis' epithet describing the "uses" made of watercourses by the 1532 statute mentioned "draining" in addition to "sailing". It stands to reason that public or navigable rivers could be used in both of the aforementioned capacities. However, one example has been provided of a river (the Medway) deemed private for navigational purposes, yet nonetheless open to the ameliorative efforts of sewers commissioners in the realm of drainage. Thus, we have some indication that the "draining" portion of the commissioners' authority encompassed a wider area than that of "sailing". Whereas in the latter part the commissions were limited to navigable rivers, in the former they could rightfully lay claim to jurisdiction over a variety of watercourses, and even when their claim intruded into those omnipresent grey areas of law, a case could be made in their favour.

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[1] William Paley Baildon, ed., Les Reportes del Cases in Camera Stellata, 1593 to 1609. (privately printed from the John Hawarde MSS, 1894), p. 379.

[2] Ibid., pp. 383, 385.

[3] HMC Salisbury, 19:222; Willan, River Navigation, p. 23.

Indeed, the great weight of responsibility resting on the shoulders of the commissioners concerned drainage and the waters which constituted its cause and effect. The Webbs were obviously mistaken in their assessment that the commissioners' jurisdiction "was at all times confined to matters concerning land drainage and embankments".[1] However, Professor Willan was basically correct in declaring that the commissioners "were not primarily concerned with navigation; their chief business was drainage and the prevention of floods."[2] What were the borders demarcating this much larger province within the dominion of the sewers commissions and at what points did those borders become indistinct and easily transgressed?

Once again, the 1532 statute furnishes the rudiments of an answer to this question. It specifically listed "walles diches bankes guttures sewers gootes calceis bridges stremes and other defenses by the costes of the see and Marsshe grounde" as being of concern to the sewers commissions. The qualification was added that these were "di[s]ruppte lacerate and broken . . . by rage of the See flowyng and reflowynge and by meane of the trenches of fresshe waters discending and having course by dyvers wayes to the See".[3] Unlike river navigation, queries raised over this aspect of the commissioners' jurisdiction seem to be have been limited. In actual practice, most of the challenges flung at the commissions in relation to this sphere of their authority were contesting not so much the extent of the areas over which they held sway but more their *modus operandi* and the magnitude of their power within those areas.

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[1] Webb and Webb, Statutory Authorities, p. 21.

[2] Willan, River Navigation, p. 16.

[3] 23 Hen. VIII, c.5-i.

A discussion on the range of the commissions' bailiwick can be found in Callis. It is well-worth recounting because it involves a fascinating '*post mortem*' debate between Callis and the "Reverend Judges" who added their comments to the second edition of his reading, published in 1685. Exhibiting a keen sense of anticipation, the reader presented a superior argument to the one given by his critics years after his death. In somewhat pedantic fashion, they impugned Callis' opinion that

> . . . all Ditches . . . Gutters, Sewers, Streams and Water-courses, where no passage of Boats is used, nor lying by the Coasts of the Sea or Marshground [*i.e.* inland watercourses which were not navigable rivers] are within the survey and correction of the Commissioners of Sewers.[1]

To substantiate their charge that he was mistaken, they cited both the 1532 and the 1606 statutes. In their words, the former "speaks onely of Ditches, Gutters, Sewers and Streams by the Coasts of the Sea, or Marsh-ground" while the import of the latter is that

> . . . neither such Ditches, Gutters, Sewers, Streams, etc. where there is neither flux or reflux, or passage of Boats, [*i.e.* navigable rivers] . . . nor any of their Walls or Banks, or the Bridges which stand on them, (other than such as the said Act hath provided for, viz. those which are within two Miles of London) are within the survey or jurisdiction of the Commissioners of Sewers.[2]

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[1] Callis, p. 87. [2] Ibid., pp. 87-88.

By these statements the "Reverend Judges" proved themselves somewhat careless, for it appears that in both cases they stopped reading when they found the evidence that best supported their position. Their summary of the 1532 statute is so adroitly refuted within the regular course of Callis' text that one wonders why they bothered to interject at all. His admission took the words right out of the judges' mouths.

> The letter of this Statute and Commission seem to extend onely to Banks, Walls and other defenses standing and being by the Coasts of the Sea and Marsh grounds thereto adjoyning . . . .

However, unlike his critics, Callis then proceeded to discuss the qualification added by the statute to this initial statement. Not only were the defences "by the costes of the See and Marsshe grounds . . . diruppte lacerate and broken . . . by rage of the See flowying and reflowynge" but damage was also acknowledged to have been done by "the trenches of fresshe waters discending . . . by dyvers ways to the See".[1] Callis quite justifiably reasoned that if fresh waters inland were specifically named by statute as a menace to be dealt with, then the jurisdiction of the commissions must include them. He reinforced his point by referring to the preamble,[2] which bemoans the "daylye greate damages and losses" incurred not only due to "outragious flowying surges . . . of the See in and upon marsshe groundes and other lowe places" but also "by occassion of lande waters and other outragious springes in and upon medowes pastures and other lowe groundes adjoyning to ryvers fluddes and other water courses".[3] Callis' use of the preamble in presenting his case was entirely legitimate[1] and his dialectic handily defeated the lacunary objections sounded by the judges.

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[1] Callis, p. 75. [2] Ibid.

[3] 23 Hen. VIII, c.5-i.

As for their rendition of the 1606 statute, the judges again conveniently ignored a crucial stipulation following the phrase around which they constructed their argument. The fact that the statute was only referring to a certain kind of watercourse not provided for by the 1532 statute seems to have been lost upon them. They somehow transformed the simple removal of a chronological fetter for the city of London into a preclusion from sewers commission jurisdiction of all watercourses which were not navigable rivers or defences for seacoast and marshland. Finally, the judges were remiss in not recognizing the qualification set by Callis on his own description of the commissioners' domain. While he saw their authority as relevant to more than just navigable rivers and defences for seacoast and marshground, he did mention certain quarters in which he felt their powers to be limited or void. In particular he felt that

> . . . all Banks and Walls wherein Waters be pent are not within the provision of these Laws, but onely such as belong to common and publique Rivers and Ditches, Sewers and Streams: for Walls and Banks made and erected as fences to mens private grounds, . . . for the draining and watering of mens private grounds, are not within these Laws, for these Laws take cognisance and notice of none but of such as tend to the good service of the Commonwealth . . . .[2]

However, Callis was not one given to speaking in absolute terms. He added that if the said walls and banks were "a letting and a hindrance to the common good of the Countrey", they could be removed or altered.[1] Here we see evidence of the most important of Callis' qualifications, which was rooted in the distinction he drew between something constituting a defence, needing defence, or having a maintenance value, and something constituting a "let" or "impediment". For example, Callis found a "pond" to be "within" the statute "not as a thing defended thereby, but as a Let and Impediment". Bridges qualified under either provision: "for some are to thereby maintained, and other some are to be extirped or reformed as Lets and Impediments".[2] Nevertheless, bridges and 'calceys' seemed to offer more restrictions for the commissioners to run afoul of than did the watercourses they were built on.[3] In summary, the basic premise we can derive from Callis' mass of detail on the subject is that, with few exceptions, sewers commissioners had full control over watercourses and their accompanying physical features, which either served as or required defence from inundation. When it came to removing or altering objects, especially private property, sticky questions could and did arise (witness the Dee mills) but, as in the realm of river navigation, with drainage, maintenance again seemed to be the key role of the commissions. Put in Callis' own words, "I am clear of the Opinion, that Rivers and their Chanels, Waters and Banks, are all of them fully within the *defence* of these Laws".[4]

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[1] Theobald, Maxwell, pp. 62-63.

[2] Callis, p. 76.

Inasmuch as Robert Callis was a native of Lincolnshire and a onetime sewers commissioner for that county, a great deal of his exposition on the legal theory of the commissions was probably based upon his intimate acquaintance with their practices. In particular, his ascription of a wider jurisdiction to the commissions seems to gain support from an examination of late sixteenth and early seventeenth-century orders and decrees handed down by sewers commissioners. For example, in 1593, sewers commissioners for Kent approached the crown on behalf of the townspeople and their efforts to repair walls and banks adjoining the slaughterhouse in Deptford.[1] In 1605, commissioners were ruling on the conditions of ditches surrounding the Tower of London.[2] Perhaps most confirmative of Callis' generous assessment are the general laws of sewers for Holland, a division of Lincolnshire, issued by commissioners in 1581. They ordered the repair, not only of "all seabanckes beinge defectyve and all fenne banckes" but also

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[1] Callis, p. 76. [2] Ibid., pp. 82, 85. [3] Ibid., pp. 89-91.

[4] Ibid., p. 79. The italics are the author's.

> . . . all other outringe banckes or banckes of defence or devysyon betwene towne and towne and all mayne draynes and petty draynes and also all other common sewars whatsoever which at the makinge thereof stand allowed of as necessarye . . . .[3]

Although Callis' editors seem to have bequeathed us a moot point on the issue of jurisdiction, we can discern from the above decree that there was no doubt in the minds of the sewers commissioners as to the length and breadth of their domain. In consideration of the other examples cited, especially the concessions made to the commissioners over drainage by the Medway landowners, it appears that the issue evoked a similar insouciance from those who would be most expected to offer opposition.

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[1] CSP-Dom., 1591-94, p. 27.

[2] HMC Salisbury, 17:402.

[3] Owen, 3:70.

# CHAPTER V

## INITIAL PROCEDURE

With respect to the authority wielded by the sewers commissions within their established territory, the Webbs commented that "the Parliaments of Henry the Eighth and Elizabeth weighed out powers . . . with no niggard hand!"[1] The absence of any exaggeration in this statement is confirmed by the "Form of the Commission" contained within the first clause of the 1532 act. It described in step-by-step fashion the methods of operation for the sewers commissions, along with the powers that facilitated successful conduct of their business.

Statute provided the ultimate source for the legislative and administrative capacity of the commissions, but as functioning bodies within the framework of state, the fount from which their legal vitality flowed was the court of chancery. The part played by the lord chancellor, both as a dispenser of commissions and selector of commissioners, has already been described.[2] His personal involvement with the commissions was intensified by another 1532 provision which gave him effective control of their inauguration. It will be recalled that the lord chancellor was a quorum member of the official group charged with issuing commissions. He also held the individual responsibility of seeing that each and every commissioner took an oath (reproduced in the statute) to uphold his office with due integrity, the swearing of which was mandatory before any commissioner could function in his appointed role. This duty was to be performed either directly by the lord chancellor, or by someone invested through a writ of *dedimus potestatem* issued out of chancery.[1]

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[1] Webb and Webb, Statutory Authorities, p. 24.

[2] supra, pp. 70-72.

An interesting adjunct to the relationship between the sewers commissions and their 'parent court' lies in the effect it must have had on the position of the lord chancellor. During the sixteenth century the administrative importance of his office was undergoing a general trend of vitiation within chancery, in contrast to that of the other major chancery personage, the master of the rolls, whose star was on the rise.[2] The 1532 statute not only reaffirmed the lord chancellor as a key figure in the promulgation of the commissions but it actually added to his jurisdiction, possibly at the expense of the master of the rolls. Throughout the Tudor century, the latter held sway over the making and issuing of writs of *dedimus potestatem*,[3] but the 1532 act ruled that, in the case of the oath for sewers commissioners, the lord chancellor was to "directe" the writ to persons of his choosing.[4] It is hard to tell how this worked out in practice, but total control of *dedimus potestatem* had devolved upon the lord chancellor by the early part of the seventeenth century.[1]

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[1] 23 Hen. VIII, c.5-ii. Among other things, *dedimus potestatem* empowered the holder to take on oath the testimony of defendants in chancery, or to administer oaths of office. Black, Law Dictionary, p. 501.

[2] W. J. Jones, The Elizabethan Court of Chancery (Oxford: Clarendon Press, 1967), p. 53.

[3] Ibid., p. 52.

[4] 23 Hen. VIII, c.5-ii.

In their affinity with the lord chancellor and chancery, the commissions of sewers were akin to those for bankruptcy and charitable uses.[2] The lord chancellor also exercised *de facto* control over the commission of the peace.[3] In this manner, chancery was the apex of a triangular affiliation between itself, (it being the administrative means of the lord chancellor), the commission of the peace, and the sewers commissions. The association between the latter two was established by the 1571 sewers statute, which not only endowed the sewers commissions with greater stability,[4] but constituted yet another addition to that ever-increasing list of responsibilities overwhelming the sixteenth-century justice out of sessions.[5]

The 1571 act called for six j.p.s out of sessions, two to be members of the quorum, to handle the appropriate business of sewers. Along with commissions for bankruptcy and charitable uses, this affords a standard against which we can measure the size of the sewers commissions themselves. In the late Tudor and early Stuart periods the bankruptcy commissions rarely exceeded a membership of nine, with a quorum of five; more common were seven-man commissions with a quorum of four.[6] Commissions of charitable uses needed a quorum of four,[7] and it appears that the quorum and the total size of the commissions were almost always one and the same.[1] In this instance as in others, such as qualifications for commissioners,[2] statutory requirements for the sewers commissions were more exacting. The 1532 act demanded that a general quorum of six be present before a meeting of the commission could be convened. However, it also called for a specific quorum of three particular individuals.[3]

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[1] W. J. Jones, Chancery, p. 52.

[2] W. J. Jones, "English Bankruptcy," p. 25; Gareth Jones, Law of Charity, pp. 39-40.

[3] Gleason, Justices of the Peace, p. 47. [4] supra, p. 68.

[5] Holdsworth, HEL, 4:144-46.

[6] W. J. Jones, "English Bankruptcy," pp. 25-26.

[7] 43 Eliz., c.1.

The sewers commissions with their specified quorum must rank more closely in importance to the commission of the peace than to the commissions of bankruptcy and charitable uses. Indeed, Professor Barnes found that for Somerset, where the j.p.s constituted the majority on all special commissions, they were also "invariably named to the quorum" of the sewers commissions.[4] This leads to the inevitable question: were the members of the specific quorum of three for sewers commissions drawn from the quorum list of the commission of the peace in each county?

There is little hard evidence in answer to this question, but a privy council letter of January 1619 makes for interesting speculation. It was directed to commissioners of sewers for the counties of Huntingdon, Northampton, Norfolk, Cambridge and the Isle of Ely, but it included the qualification, "or to any sixe of them, where of two to be of the quorum."[5] The general quorum of six is thus recognized but the mention of two who are to be "of the quorum" is confusing.

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[1] Gareth Jones, Law of Charity, p. 40.

[2] supra, pp. 74-75. [3] 23 Hen. VIII, c.5-i.

[4] Barnes, Somerset, p. 146. [5] APC, 1617-19, p. 347.

Firstly, according to the sewers statute, a specific quorum of two was a legal impossibility. Secondly, the words, "of the quorum", imply the presence of a previously designated group of men, a facsimile of the quorum list for j.p.s, any of whose attendance at a meeting would fulfil specific quorum requirements. There is no evidence that such a group existed for sessions of sewers. In fact, the Form of the Commission contained within the 1532 statute suggests the opposite. At the point where the general quorum of the commission is set at six, the block letters "A", "B", and "C" are used to indicate that in an actual commission three men would be identified for that instance as specific quorum members.[1] In other words, each and every commission issued would name its own specific quorum members and supposedly they would only act as such for that particular commission. Of course, the same men could be called to serve in such a capacity many times, but it appears that each time their status would have to be re-established. Thus it is doubtful that there was any long-standing group of individuals who could be considered "of the quorum". One must conclude that the letter in question referred to the quorum list for the commission of the peace.

A similar example can be found in the general laws of sewers for Holland, Lincolnshire, in 1581. They required the consent of "sixe Commissioners of the Sewars whereof three to be of the quorum" for alterations to dikes.[2] Once again there is a general reference rather than an explicit mention of individuals. It is highly probable that, as a time-saving device, quorum lists of the j.p.s were used to provide names for the specific quorum of the sewers commissions, and that the latter eventually became synonymous with the former.

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[1] 23 Hen. VIII, c.5-i. [2] Owen, 3:70.

One undeniable conclusion that can be drawn from the privy council order of 1619 is that the rote prescribed by statute was not always observed. Another deviation from the norm lay in a 1613 command to the j.p.s of Norfolk to take action in relief of severe flooding in the Marshland district, "pursuing therein the Comission of Sewers as the ground of your authority and direccion". The extreme urgency of the situation was apparent by the tone of the letter. Circumvention of standard procedure by the council would be understandable, yet it is curious that the missive was addressed to nine specifically named men, eight of them j.p.s, "or to any fower or more of them".[1] The choice of four as a quorum seems to represent a lack of concern or an absence of knowledge on the part of the council with respect to the basic statistics for the commission. It is conceivable that the privy council believed a smaller quorum might more easily expedite a solution to the crisis, but this might be crediting a remote central authority with too much insight into the particular problems of administration in a region so enigmatic as the fen country.

If the larger general quorum and the inclusion of a special quorum helped to set the sewers commissions apart from others, their aggregate totals accentuated the difference. The membership of the commissions of bankruptcy and charitable uses was kept small and even the commission of the peace was theoretically restricted to six members, although this limit had become anachronistic by the sixteenth century.[2]

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[1] APC, 1613-14, p. 265. [2] Lambarde, Eirenarcha, p. 37.

The sewers commissions, on the other hand, displayed rather wide disparities in size. For example, in the 1580s and 'nineties in Kent, there were a number of sessions of sewers held before commissions of relatively compact proportions such as seven or eight men.[1] In 1622 there was a commission of the same dimensions for Essex.[2] However, in Lincolnshire in the 1580s there were laws for sewers handed down by some commissions in excess of ten persons.[3] In 1584 and again in 1624, also in Lincolnshire, there were commissions whose official numbers attained the voluminous totals of nineteen and twenty.[4]

It seems fairly clear that the sewers commissioners were not dismayed by the logistics of working in relatively large and unwieldy groups. Letters in the Acts of the Privy Council to and from multiple commissions (from different counties), all working on the same project and being treated as one huge commission, are legion, and yet there is only one instance of complaint. In late 1618, the sewers commissioners for Norfolk petitioned the council to be given a "duplicate" or separate version of the commission which had originally grouped them with commissioners of Huntingdonshire, Northamptonshire, Cambridgeshire and the Isle of Ely. In January of the following year, the commissioners for Cambridgeshire and the Isle of Ely protested similarly that the sessions of sewers were difficult for them to attend because of inclement weather and distances almost impossible to traverse given the time allowed. Both requests were honoured by the privy council and the conglomerate commission was divided into more viable units.[1] This incident notwithstanding, the general trend seems to have been one of agglomeration, and the sewers commissions definitely predominate when compared on a basis of size to commissions of bankruptcy and charitable uses.

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[1] CSP-Dom., 1595-97, pp. 223-24. [2] APC, 1621-23, p. 377.

[3] Owen, 3:72, 80. [4] Ibid., 3:73; APC, 1623-25, pp. 181-82.

Once the lord chancellor had set administrative wheels in motion the business of the sewers commissions was to discover the condition of drainage and flood control systems, and then take the steps necessary for the maintenance and improvement of those systems.[2] Guidelines were drawn within which the commissioners would be required to operate. They were to follow the dictates of their own wisdom and discretion, but attendant was the enjoinder that the commissioners were to proceed according to the "fourme tenure and effecte of all and singuler the estatutes and ordnaunces made before [1532] . . . touching the premises".[3] Next came the final and most consequential stricture. As part of their information-seeking transactions, the commissioners had to "enquire by the othes of the honest and lawful Men of the said Shire or Shires".[4] Here was the first mention of the juries and their inclusion in the court of sewers. At the end of the Form of Commission, the statute provided the remainder of its sparing amount of detail on the juries. The responsibility of assembling a jury was delegated to the sheriff, who was duty bound to bring together at a time and place appointed by the sewers commissioners as many "honest" men as they thought necessary. The only qualification was that these men be of that kind "by whome the trouth beste be knowen".[1] This dearth of statutory particulars makes it difficult to describe both the role of the juries and of the sessions of sewers in which they were major participants, but one can gain a sense of their size and composition by looking at the records of the late Tudor sewers commissions for Holland, Lincolnshire.

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[1] APC, 1617-19, pp. 314, 350. [2] 23 Hen. VIII, c.5-i.

[3] Ibid. [4] Ibid.

This source reveals the absence of any fixed number for the size of juries. A 1571 verdict for the wapentakes of Skirbeck and Elloe was one of the few which listed all the names of the jurymen involved. Although the folio on which it was found is in a deteriorated condition, there are at least eighteen names extant.[2] Another verdict for the same area taken some seven years later, also on a marred document, yields a minimum of nineteen names, and in 1584, again for Skirbeck and Elloe, a jury of twenty-four men was convened.[3] In contrast to these larger bodies was the jury of four for Gosberton and Surfleet, assembled during 1565. At approximately the same time a verdict was given by a jury of dikereeves for the township of Moulton.[4]

Mr. A. E. B. Owen found that the average number of dikereeves per town in sixteenth-century Lincolnshire was two. This was sometimes exceeded, but the maximum was never more than five or six.[5] It stands to reason that these same figures would apply to the Moulton jury for sewers. Between the extremes of juries of six or less and those of eighteen plus, we have the figure of twelve set by Professor Henderson as that for typical sewers juries.[1] Although she offered little in the way of conclusive evidence, her case gains support from Robert Callis' editors. They were speaking within the context of late seventeenth-century theory and not early seventeenth-century practice, but their declaration that "the presentments at a Court of Sewers must be by the oaths of twelve men" lends weight to Professor Henderson's suggestion.[2] As for the contradictions inherent in the Lincolnshire examples, they should probably be taken as added proof that procedure in semi-autonomous regions like the fen country was more often determined by the demands of the situation rather than the command of statutory precept.

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[1] 23 Hen. VIII, c.5-i. [2] Owen, 2:83 and n. 1.

[3] Ibid., 3:6 and n. 1, 52.

[4] Ibid., 2:8, 15. For information on dikereeves see infra, p. 110.

[5] Ibid., 3:ix-x.

There was no exact qualification set by statute as to those persons eligible to sit on a jury for the court of sewers, but Robert Callis referred to an act of 1497 which ruled that a juror who "was to pass upon trial of Land" had to be possessed of a freehold estate worth at least 40s. *per annum.*[3] Although this statement was not in the company of any allusions to sewers, one may infer that such a criterion would automatically extend to sewers jurors. In fact, it appears that jurors were often men of substance within the local hierarchy, and that the 40s. freehold requirement was generally upheld or bettered. In some instances verdicts were recorded with the name of a leading juryman, presumably the foreman, stated along with his social standing, such as "By Thomas Roper yoman and hys felowes", or "The verdyt of Roger

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[1] Henderson, Administrative Law, p. 29. [2] Callis, p. 110.

[3] Ibid., p. 245. The same holdings allowed a man to exercise the franchise in shire elections.

Morrowe of Sutton yoman and his fellowes".[1] Where jurors were specifically named, entries of "gent." or "esquire" abound among the lists. There are even examples of gentlemen sitting on juries who qualified to serve as sewers commissioners. In 1576, Robert Carr and Richard Bollys were sewers commissioners for Boston, Lincolnshire, and the three wapentakes forming its hinterland.[2] Approximately two years later they acted as jury members, giving a verdict to the court of sewers for the same general area.[3]

The basic premise established by the 1532 act was simply that those selected by sewers juries be well acquainted with the vicinity and its landowners and water defences. Who better than to serve as jurors, at least within Lincolnshire, than the dikereeves? These local officials, responsible for the supervision of all the components of systems for drainage and flood protection, were peculiar to Lincolnshire and small parts of Norfolk and the Isle of Ely.[4] They provided the sewers commissioners with an easily accessible and expert source of information, and it is only natural that they appear prolifically as jurors throughout the records of Lincolnshire sewers verdicts. While the dikereeves were unique to Lincolnshire, the use of convenient, at-hand sources for sewers jurors evidently was not. In Somerset, where the business of sewers would not amount to as much as in the perpetually sodden eastern counties, the practice was to merge sessions of sewers with the quarter sessions and let the hundred juries make their presentment for sewers in the same way as they did for other areas of county administration.[1] Such expedience could not have been feasible in the major trouble spots, but it is probable that, as with the commissioners, the same group of yeomen and gentlemen would act as jurors for sewers sessions in addition to quarter sessions. This is born out by a small contretemps in Yorkshire in June 1640.

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[1] Owen, 2:2, 50. [2] Ibid., p. 131. [3] Ibid., 3:6.

[4] Ibid., p. ix.

Complaint was made to West Riding j.p.s by citizens who had been selected for jury duty at the quarter sessions in Rotheram, as well as for sewers sessions beginning the next day in Doncaster, approximately twelve miles distant. The j.p.s castigated the sewers commissioners for their persistence over the previous two years in holding their sessions at the same time as the quarter sessions, and thus placing jurors and bailiffs in the unpleasant position of having to be in two places at once.[2] The j.p.s also commented that the said jurors were "very fearfull to be fined there [at the sessions of sewers] if they [made] defalt." The justices then requested that the absent jurors be excused of any fines that might be assessed by the sewers commissioners.[3] This underscores the weight carried by the sewers commissioners within their own locale. When faced with the choice of being truant from a session of sewers or a session of the peace, the jurors naturally attended the latter but were still very concerned about missing the former--concerned enough to appeal to the j.p.s for protection from the wrath of the jilted sewers commissioners. Although the sessions of sewers could not rival the quarter sessions in terms of prestige, they appear, in this instance at least, to have come a very close second.

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[1] Barnes, Somerset, p. 148.

[2] John Lister, ed., West Riding Sessions Records, vol. 2 (Yorkshire Archaeological Society: 1915), pp. 224-25.

[3] Ibid., p. 225.

The juries assembled for quarter sessions serve as models for a comparison with sewers juries, which in turn will help to describe the role played by the juries at the sessions of sewers. There were three kinds of jury empanelled at a session of the peace: the grand jury, the petty jury, and the hundred jury. Juries for sewers sessions incorporated elements of all three into their make-up, but were probably most comparable to the grand jury of the quarter sessions, which consisted of twenty-three freeholders.[1] As we have seen, sewers juries of this size were not uncommon. Moreover, their respective functions had a fair degree of similarity. The grand jury was in part responsible for acquainting the justices, by means of presentment, with problems that had occurred within the pale of county administration. Included would be reports on such things as decayed bridges, highways fallen into disrepair, and the peccadilloes of local officials.[2] This contribution of information is the most notable characteristic shared between the grand juries and the sewers juries.

The 1532 statute described exactly what sort of information the sewers juries were to provide. The sewers commissioners were to discover from the jurors "places where . . . defaultes or anoysaunces be". However, the most important things to be learned were

> . . . through whose defaulte the said hurtes and damages have happened and who hath or holdeth any landes or tenementes or comon of pasture or profite of fisshing or hath or may have any hurte

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[1] A. Hassell Smith, County and Court: Government and Politics in Norfolk, 1558-1603 (Oxford: Clarendon Press, 1974), p. 91.

[2] Ibid.

> losse or disadvauntage by any maner of meanes in the said places, as well nere to the said daungers lettes and impedimentes as inhabitying or dwelling there aboute by the said walles diches bankes gutteres gootes sewers trenches and other the said impedimentes and anoysaunces.[1]

As a source of knowledge for the sewers commissioners the juries were crucial, and of the six "things to be done by a Jury" listed by Callis, five of them involved this aspect. First, the jury was to ascertain who was responsible for the erecting of any lets or impediments. The jurors were also to name those persons who were negligent, allowing defences to lapse into a state of decrepitude. In connection with this, they had to familiarize the commissioners with all persons liable for repairs and on what legal basis those persons were so bound. Fourthly, the jury was to establish which lands were in danger and to whom they belonged. Fifthly, if the commissioners were initiating a new project of construction (and this in itself was a bone of contention), the jury would determine which landowners in the area were obligated to contribute financially to the works.[2]

In order to provide the sewers commissioners with this highly specific intelligence, the jurors would require an intimate acquaintance with the vicinity for which the commission was issued. With this specialized knowledge, the sewers juries take on one of the traits of the hundred juries of the quarter session, which were responsible for keeping the justices apprised of happenings at the local level.[3] However, the sixth entry on Callis' list adds another facet to the function of the juries within the sessions of sewers and through it they can also claim a tenuous kinship with the petty juries of the quarter sessions. Whereas the grand jury had the two-fold task of making presentments and deciding whether or not indictments should go to trial, the petty jury had the job of trying and delivering verdicts on those indicted by the grand jury.[1] In a somewhat similar fashion, the sewers juries could pass sentence on those they presented to the commissioners as defaulters, because they apparently had the power to impose amercements on such defaulters.[2]

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[1] 23 Hen. VIII, c.5-i. [2] Callis, pp. 108-9.

[3] Hassell Smith, Norfolk, p. 91.

Details as to how much the juries shared in the business of punishing defaulters are somewhat hazy. According to statute this responsibility was left to the sewers commissioners and there was no provision for the involvement of the juries in the process.[3] Yet the assertions of Callis, and later Giles Jacob, are buttressed by some hard evidence. Professor Henderson found presentments made by juries which specified the repairs to be performed by the delinquent and the fine to be paid if these were not effected. Although she described this as typical of jury presentments in Surrey and Kent,[4] the converse is true for Lincolnshire where few, if any, jury verdicts can be found which include penalties against the persons named in the verdict. More characteristic of the latter type is the following:

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[1] Hassell Smith, Norfolk, p. 91.

[2] Jacob, Law Dictionary, s.v. "sewers"; Callis, p. 109.

[3] 23 Hen. VIII, c.5-i.

[4] Henderson, Administrative Law, p. 29 and n. 42. It should be noted that Professor Henderson was speaking of procedures prior to 1532 whereas the Lincolnshire records are of Elizabethan vintage.

> Item the same jury seayth that ther is a pettye drene called the Owld Lode extendying from a place called the Greynes unto the water of Nene the which ought for to be clenesed and kepe by Roger Banker the fysher ther of.[1]

Occasionally a jury would go so far as to specify the amount that freeholders in an area were to be assessed for a works project,[2] but this did not actually enter into the realm of punishment, although the freeholders themselves might have argued this point.

The part played by the juries in the chastisement of offenders, whether large or small, is less important than the fact that they countered the power of the commissioners at the sessions of sewers. The commissioners were dependent upon them for information and apparently they had a say in tax assessment, although this seems to have been cause for debate in many instances. There were other checks supposedly holding the balance against the commissioners, that of discretion being by far the most controversial. The nature of discretion as it applied to the sewers commissions was a two-edged sword, open to diametrically opposite interpretations by inimical factions.

Professor Henderson credited the 1532 statute with creating a change in the role of the sewers juries by conferring greater autonomy on the commissioners through the frequent use of the words "wisdom and discretion".[3] Indeed, the language of the statute leads one to believe that their use implied emancipation rather than restraint for the commission. In contrast to the 1427 sewers act, which is totally devoid of these words, the 1532 statute mentions "discretion" in conjunction with eight different responsibilities settled upon the commissioners. In four other places, a form of discretion is alluded to by the use of a phrase such as "which to you . . . shall seme most expedient".[1] An attempt to maintain perspective lay in that other limitation which required commissioners to observe previously passed laws and statutes pertaining to sewers commissions.[2] Nevertheless, as did the commissioners, so must we find it uncomfortably easy to construe the wholesale inclusion of discretionary power as a truly lavish bequeathal of administrative, legislative, and judicial licence. There is a fundamental difference between this assessment, held to primarily by the sewers commissioners and the privy council, and that of men like Sir Edward Coke and Robert Callis.

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[1] Owen, 2:14. [2] Ibid., pp. 40, 83-84.

[3] Henderson, Administrative Law, p. 30.

Callis' lucid understanding of the responsibilities of discretion, if displayed by more sewers commissioners, might have had an oleic effect on the troubled waters of early seventeenth-century drainage. He prefaced his discourse on discretion by portraying it somewhat lyrically as "the herb of grace that I could wish every Commissioner of Sewers well stored withall".[3] Callis stressed the point that not only were the commissioners to exercise *discretio specialis*, that which applies "where the Laws have given no certain rule to be directed by in a Case", but also a discretion of two other types; general and legal. He described the former as being required of "every one in every thing that he is to doe" and the latter as a duty to "administer Justice according to the prescribed rules of the

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[1] 23 Hen. VIII, c.5-i. [2] supra, p. 107.

[3] Callis, p. 112.

Law".[1] It is apparent that, at times, not much heed was given to these last two kinds of discretion by sewers commissioners. There were numerous occasions when a lack thereof spawned disputes centred around other facets of the commissioners' authority, but there were also instances where discretion as an intrinsic issue came to the attention of the courts.

In 1598, the case of Rooke versus Withers was heard in the court of common pleas, resulting in decisions on several points appurtenant to the sewers commissions. It was ruled that although "the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law."[2] Sir Edward Coke commented upon this resolution that "discretion is a science or understanding to discern between falsity and truth, . . . and not to do according to their wills and private affections."[3] In 1610 another action over sewers arose in the common pleas, bearing for posterity the name of Keighley's Case. One of the justices, Sir Thomas Walmesley, had served in Rooke's Case, and on the point of discretion and the sewers commissioners there was reiteration of what had been said twelve years before, though perhaps in greater detail. Judges and commissioners were exhorted to display qualities of wisdom and conscience, and discretion was defined by the phrase *scire per legem quid sit justum*--to know through law what is just.[4]

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[1] Callis, p. 112. [2] 5 Co. Rep., 100a. [3] Ibid.

[4] 10 Co. Rep., 140a. I am indebted to my friend and erstwhile colleague John Rasmussen, M.A., for his freely-given assistance with Latin translation at this and other points in the thesis.

It is obvious that contemporary legal minds were not overly impressed with either the abundant puissance apparently endowed by the statute of 1532, or the claims of the sewers commissioners which drew inspiration from that endowment. Even Robert Callis, perhaps the most ardent expositor of both merit and prerogative for the sewers commissions, allowed that he would "rather trust to the worst certain law, than to give too much way to the uncertain discretion of the Commissioners".[1]

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[1] Callis, pp. 113-14.

# CHAPTER VI

## CONDUCT AND CONTROVERSY

In the Form of the Commission of the 1532 statute, following the clauses detailing the inquisitory transactions of the sessions of sewers, came the instructions of how the commissioners were to employ the intelligence they had gathered. After discovering by way of jury presentment the whereabouts of any broken links in the chain of defence, and those to be held responsible, they were to "taxe assesse change distreyne and punysshe".[1] This proviso must be considered the single greatest source for the storm of controversy surrounding the sewers commissions.

Shorn of its appendant issues, the conflict could be reduced to a simple but almost unanswerable question: how exactly were the sewers commissioners to carry out the first three actions listed above? It is ironic that a statute apparently created for the purpose of clarification and definition[2] should be the cause of so much confusion. In fact, the directions given for the procedures of taxation would have been reasonably precise had they been presented alone. It was the added leavening of discretion that clouded the issue and left for the commissioners a loophole which both invited exploitation and exposed an inherent weakness in the provisions of the 1532 act.

Orders pertaining to those who might be taxed have already been noted.[1] As to how this was to be done, the commissioners were first commanded to operate "within the metes limites and boundes of olde tyme accustomed or otherwise as els where within our Realme of Englonde".[2] Presumably, this was meant to ensure that proper respect was given to peculiar local customs which could be manifest in prescriptive rights or such ancient codes as the laws of Romney Marsh. Secondly, the commissioners were to assess sewers rates on a basis of

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[1] 23 Hen. VIII, c.5-i. [2] supra, p. 50.

> .. . the quantitie of . . . landes tenements and rentes by the nombre of Acres and Perches after the rate of every persons porcion tenure or profitte, or after the quantitie of their comon of pasture or profitte of fysshing or other Commodities there . . . .[3]

After this came the portentous clause conferring discretionary authority. The commissioners were to pursue the ends described above

> . . . by such waies and meanes and in suche maner and fourme as to you or vj[6] of you where of the said A.B. and C. to be thre, shall seme most convenient to be ordeyned and don for redresse and reformacion to be had in the premisses.[4]

No small demands were made of the sewers commissioners. Considerable pains had to be taken if the exactions set for taxation by the statute were to be properly met. The procurement of the mass of specific information necessary for such a meticulous assessment would at its best be an exhaustive and time-consuming procedure. This was the fundamental flaw in the process fashioned by the statute for the relief of flood conditions. Since the latter were often situations of emergency, requiring a swift response to stave off damage to property and sometimes even loss of human life, a more streamlined method of taxation should have been allowed to the commissioners.

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[1] supra, pp. 112-23. [2] 23 Hen. VIII, c.5-i. [3] Ibid.

[4] Ibid.

It is difficult, however, to see how this could have been managed without sacrificing an equitable distribution of responsibility for the sewers among the inhabitants of a locale. It seems that in this instance, the rights of the individual came into collision with that cause so often espoused by the monarchy--the good of the common weal. On the strength of the less than ironclad discretionary concession,[1] the commissioners attempted to circumvent the trying procedure demanded of them, opting instead for stop-gap measures made requisite by the dictates of exigency. The opportunities for complaint, already inherent in the system of individual assessment by way of jury presentment, were augmented by these improvisations. Together they occasioned a clamor that the government could not ignore.

Although the uproar reached a crescendo in the second decade of the seventeenth century, murmurings were heard in the early Elizabethan years. In 1567, inhabitants of the soke of Bolingbroke protested to the chancellor of the duchy of Lancaster against allegedly unfair sewers assessments.[2] The privy council's involvement in the assessment of taxes for sewers can be traced at least as far back as the same general period. In 1576, the council authorized sewers commissioners to spread the tax burden for the cleansing of the River Wisbech further afield than just the Isle of Ely;[3] they were also to procure subscriptions from the surrounding counties, presumably because their lands were equally affected by the river. This style of assessment seems to have been in basic harmony with the principles propounded by statute, as was a later instance in Somerset. Here, in 1607, justices of the peace ruled "by virtue of the Commission of Sewers" that landholders adjoining the Severn, some of whom were of "mean estate" and thus unable to make sufficient repairs to banks, should be succoured by those who, while not situated adjacent to the river, owned lands on the level which would be benefited by the maintenance of the banks.[1]

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[1] supra, pp. 116-18. [2] CSP-Dom., 1547-80, p. 282.

[3] Ibid., p. 523.

Unfortunately, the consistency evident in these two examples does not prove the rule where taxation was concerned. For instance, in 1593 a large-scale project for the draining of East Anglian fens by private entrepreneurs was submitted to Lord Burghley. Because of potential difficulties arising from "the diversity of the tenures and leases of the fens, and the opinions of men" it was suggested that, to expedite the collection of taxes, a special act of parliament be passed to create rules of procedure for that project alone.[2] Other departures from the statutory norm included attempts to raise voluntary contributions, as in May 1616, when Suffolk and Cambridge j.p.s were ordered to assist those inhabitants of Newmarket "whoe shew themselves willing to contribute towards the good worke" of scouring town watercourses in order to ease winter run-off.[3]

The two devices most frequently employed by the sewers commissioners encompassed opposite extremes which in the end amounted to the same thing--a disregard for the demands of statute. Their practice was to lay a flat sum to the charge of an entire town or hundred, or in some other cases to place the burden of payment for sewers works squarely on the shoulders of one or two individuals deemed most financially able to carry the load. The second form of high-handed behaviour was initially challenged at law in 1598 by the plaintiff in Rooke's Case. In this instance, the holder of seven acres of land adjoining the Thames in Essex had been required to pay in full for a bank which, while on his land, served as protection for another eight hundred acres on the same level. Paying due deference to statute, the court of common pleas resolved that "the commissioners ought to tax all who are in danger of being damaged by the not repairing equally, and not him who has the land next to the river only".[1]

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[1] HMC Salisbury, 19:50. [2] CSP-Dom., 1591-94, pp. 334-35.

[3] Folger Library MS, G.b.10, f.56v.

It soon became apparent that the privy council did not hold the specifications of the sewers statutes in the same high esteem as did the bench of common pleas. The council's lack of respect for the former predicated a like attitude towards the opinions of the latter. Both were manifest in a 1601 directive to the sewers commissioners for Norfolk, pertaining to the town of Terrington. Although on the coast, it was of higher elevation than its inland neighbours: Walpole, Walton, Walsoken, and Emneth. Thus its sea defences were crucial for the safety of the other four towns. The privy council recognized the legality of a tax by acre (*i.e.* an individual assessment) on all five towns to pay for repairs to the walls and banks of Terrington. Yet even in the face of its own acknowledgement of which procedure was lawful, the council authorized the sewers commissioners, should they think fit, to lay a greater charge upon Terrington than its hinterland.[1] Obviously, the privy council chose to give greater weight to the vague statutory provisions for the commissioners' "convenience" than to the explicit instructions set out for taxation. This policy was to hold sway in the ensuing decades.

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[1] 5 Co. Rep., 99b.

With the first legal censure of the commissioners' extemporaneous measures having been delivered in 1598, a second was not long in following. A major drainage project was underway in the Isle of Ely by 1609, provoking opposition and complaint from the inhabitants of the area.[2] Perhaps by way of response, the privy council submitted a legal question concerning certain decrees of sewers commissioners in the Isle of Ely to the chief justice of the common pleas, Sir Edward Coke, and his subordinates on the bench, William Daniel and Thomas Foster.[3] The council's choice of these men was appropriate, for Coke and Daniel were the justices of assize for Norfolk at the time and could be expected to have expert knowledge on the topic of sewers.[4] However, events proved it to be a mistake, for the answer returned could not have been at all pleasing to the council. Furthermore, it furnished their opponents with fresh ammunition in their battle to resist the sewers commissions. As for Coke, the repercussions of his decision became part of the imbroglio that precipitated his ouster from the king's bench in 1616.[1]

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[1] APC, 1601-4, p. 403.

[2] CSP-Dom., 1603-10, pp. 536, 550.

[3] 10 Co. Rep., 142b-143a.

[4] J. S. Cockburn, The History of English Assizes (Cambridge: University Press, 1972), p. 268; CSP-Dom., 1603-10, passim.

The Case of the Isle of Ely, as it became known, was not a legal case in the classic sense of the word, argued in court with all the attendant proceedings, but rather a point of law referred to a panel of judges by government administrators. It should be emphasized that the opinion rendered, while not holding the value of legal precedent, was nevertheless one solicited by the privy council, and had it been more to their liking might well have been treated as such. More than one facet of the power of the commissions was at issue, but the matter in question over taxation was whether or not the commissioners had the right to impose a single, general tax upon an entire town. In their response Coke, Daniel and Foster adhered strictly, if somewhat unimaginatively, to statute. Indeed, it was repeated almost verbatim.

> It was also resolved that none could be taxed towards the reparation, &c. but those who had prejudice, damage, or disadvantage by the said nusances or defaults, and who might have benefit and profit by the reformation or removing of them.
>
> Also the tax, assessment, and charge ought to have these qualities. 1. It ought to be according to the quantity of their lands, tenements, and rents, and by the number of acres and perches. 2. According to the rate of every person's portion, tenure, or profit, or of the quantity of the common of pasture, or of fishing or other commodity. And therefore it was clearly resolved by them, that the said tax generally of a severall sum in gross upon a town is not warranted by their commission, but it ought to have been particular, according to the express words, upon every owner or possessor of lands, tenements, rent, &c. observing the qualities aforesaid.[2]

While this opinion established no hard and fast legal precedent for all to observe, it did make for the clarification of legal theory on the subject. Nevertheless, this was to prove small help in solving the practical problems faced by the commissioners in their efforts to counter sudden inundations. Ironically, Coke himself was asked to intervene, along with Sir Thomas Fleming (chief justice of the king's bench), Lawrence Tanfield (chief baron of the exchequer), and Sir James Altham (baron of the exchequer), in a taxation case in Essex, which arose during the winter of 1612-1613. The problem, as stated in a privy council letter of May 1613, was the delay caused "for want of determining . . . who and what landes ought to be chargeable with the repaire and amendment of the saide breaches by the lawe", the result being that "one great and dangerous breach . . . remayneth yet unstopped".[1]

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[1] James Spedding, The Letters and Life of Sir Francis Bacon (London: Longmans, Green, Reader, and Dyer, 1872), 6:88-89.

[2] 10 Co. Rep. 142b-143a.

The Case of the Isle of Ely notwithstanding, the council's attitude remained largely unchanged, with expedience occupying the position of highest priority in their dealings with the sewers commissions. In November 1613, the sewers commissioners for Norfolk were authorized to combat flooding in Marshland by proceeding at their own discretion if necessity required greater alacrity than their commission allowed.[2] At the same time, commissioners for Huntingdonshire, Cambridgeshire, and the Isle of Ely were correctly instructed to tax according to the commands of statute, but were also empowered to use the rather stringent measure of binding any who refused to pay their taxes to appear before the privy council.[3] This anticipation of opposition to the sewers commissioners, along with such complaints about taxation as those received by the council in December 1613, from the inhabitants of Wisbech,[1] gives testimony of the increasing discontent fomented by the actions of the commissioners. The problem which began with taxation took on wider implications due to the avenues of resistance pursued by recalcitrant citizenry and the roadblocks thrown up by the privy council in their attempts to frustrate these efforts.

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[1] APC, 1613-14, pp. 13-14. [2] Ibid., pp. 265-67.

[3] Ibid., pp. 270-71.

As for the taxation dilemma, to this day there is confusion as to exactly which point of view was right. Professor Louis Knafla, in his study of Lord Ellesmere's papers, stated unequivocally that Coke "did not interpret accurately the statutes which were at issue" in the Case of the Isle of Ely.[2] Yet, we have seen how closely Coke clung to the wording of the statute in giving his opinion. The only weakness (if it can be termed as such) in his argument was his dogged adherence to those specific stipulations, and the blind eye he turned to the discretionary provision which followed. Nevertheless, he was later supported in this attitude by the eminently respectable Callis who, it will be recalled, preferred "the worst certain Law" to the "uncertain discretion" of the commissioners.[3] Professor Knafla's reasoning for his indictment of Coke took none of the above into account, but instead offered in evidence such irrelevancies as the fact that the 1532 act "provided a Chancery process for the collection of unpaid taxes, declaring that the decrees of the commissioners became the law of the land and could be excepted only by Parliament."[1] It is difficult to see how this proves Coke to be in error on the point of taxation.

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[1] APC, 1613-14, p. 299.

[2] Louis A. Knafla, Law and Politics in Jacobean England (Cambridge: University Press, 1977), p. 153.

[3] supra, p. 118.

While Professor Knafla's assessment of Coke's statutory interpretation must be considered faulty, the picture he has painted of the chief justice as an obstructionist is essentially valid.[2] Coke's position, when seen from the perspective of the lord chancellor, (the same direction from which Professor Knafla could not avoid observing the matter), sat squarely in the path of progress. Although Coke may have had the letter of the law on his side, he did not show much consideration for the efforts of a harassed government, ostensibly striving to keep the good of the realm uppermost in mind when formulating its policies. The view of the latter is best represented by two statements of Lord Ellesmere's, one contained in his Observation upon Coke's Reports, and the other in a speech to Sir Henry Montague, who replaced the unrepentant Coke as chief justice of the king's bench in November 1616. In the former, Ellesmere quite rationally argued that if, in the face of a sudden and critical inundation, the commissioners had to go to the lengths prescribed by statute to assess taxes, the "whole Countrey hapely may be drowned." The lord chancellor lamented that if Coke's opinion "should be Law it giveth a great blowe to the power of . . . [the sewers] Commission". Instead, he held that

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[1] Knafla, Law and Politics, p. 153. The latter phrase in itself is open to query, the matter of commissioners' decrees not being so cut-and-dried as Professor Knafla would have us believe. infra, pp. 141-44.

[2] Knafla, Law and Politics, p. 153.

> . . . in Cases of necessity the Law allowes those wayes that are of most expedition and of quicknest dispatch, which is by setting a generall Tax, and then the Landholders among themselues to rate themselues in particular that the Worke may goe with speed.[1]

Although the latter point may have been legally debatable, the logic in the proposal, at least for times of emergency, could not be denied. In his speech to Montague, Ellesmere lodged his complaints against Coke in an emotional outburst seemingly born of frustration and more akin to rhetoric than reason. He lambasted the former chief justice for detaining sewers commissioners in his court, "disputing of tricks and moote points concerning taxes" and in so doing "suffer[ing] a great part of the Realm to be surrounded and overflown; for the winds nor the Sea could not be stayed with such new constructions and moote points."[2]

A further contemporary appraisal of Coke's standpoint can be found in Callis' lecture, but this is more dispassionate in tone and more objective in substance. Reciting clauses from the charter of Romney Marsh as well as from the 1532 act, Callis asserted that "these words literally taken afford the construction to be according to the opinion of Sir Edward Coke."[3] However, he also made a case for the general taxation of a town, acknowledging that inequities might occur but affirming his belief in "the old adage of Law, Better it is to suffer a mischief to one or more particular persons, than to permit an inconvenience to the whole Commonwealth which concerns a multitude".[1] Besides, he allowed, in this situation an injured party could bring suit against a sewers commissioner who distrained his chattels for non-payment of taxes, and so recover what was rightfully his by due process of law.[2]

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[1] Knafla, Law and Politics, p. 310

[2] Moore, K. B., 828

[3] Callis, p. 123.

Unfortunately, in addition to their countenancing dubious methods of taxation, we shall see that the privy council also deprived the citizen of this due process. The order of 1613, commanding commissioners to take bonds from recalcitrants for their appearance before the council, was an indicator of the direction their policies were to take.[3] Just how far the government was willing to go to seek a solution to their problems was made apparent in 1616. The policies put into effect at that time would earn the label of "arbitrary measures", bestowed over two hundred years later by Sir William Blackstone, who declared that the "pretence for which . . . was no other than the tyrant's plea, of the necessity of unlimited powers in works of evident utility to the public".[4]

These measures were contained in a privy council order dated 8 November, 1616, the authorship of which seems attributable in the main to Sir Francis Bacon, then attorney-general.[5] This instrument is of particular value in our study of the different facets of the operation of the sewers commissions. Its "four principall heades wherein the extent of the commission is questioned"[6] not only include almost all major aspects of the commissions' functions, they also give us an insight into the difficulties which plagued the commissions. Furthermore, the order was the government reaction to those difficulties, and the steps taken to counter them outlined therein presaged the attitude on the part of government which so rankled parliament in subsequent years.

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[1] Callis, p. 126. [2] Ibid., p. 125.

[3] supra, p. 126. [4] Blackstone, Commentaries, 3:74.

[5] APC, 1616-17, p. 57.

[6] Ibid. For the actual 'titles' of these four issues see infra, pp. 131, 146.

It is coincidental and convenient that, because of its subject matter, the 1616 directive happens to provide both a guideline and a culminative point for an examination of the operation of the commissions. Having already observed the developments until 1616 of one issue of the four dealt with in the document--that of taxation-- we shall now turn to the other three that were listed. The first ostensible misconception to which Bacon and his colleagues addressed themselves was the prevalent idea "that the Commissioners of Sewers have not authority to cause newe banckes, draynes or sluces to bee made, where there hath not beene any before".[1] At first glance, statutory pronouncement on this point seems quite straightforward.

> And also to refourme repayre and amende the said walles diches bankes gutters sewers gootes calceis bridges streames and other the premisses in all places nedefull, and the same as often and where nede shalbe to make newe . . . .[2]

This segment came immediately upon the heels of those previously quoted which concerned the commissioners' two initial acts of inquisition by jury and assessment of taxes. Thus, after ascertaining the condition of the sewers and who bore responsibility in each case, and then levying the taxes that would enable rectification, the next step was to see the required work done. By all appearances, the statute bade the commissioners not only to repair existing banks, sewers, ditches, and so on, but to create new ones where necessary. However, as Robert Callis admitted, it could be argued that the words "to make new" simply meant "to make old works like new".[1] Semantic arguments notwithstanding, the phrase was interpreted by the sewers commissioners with the bias most favourable to their work. This often provoked no opposition and sometimes even drew support from local inhabitants.

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[1] APC, 1616-17, p. 57. [2] 23 Hen. VIII, c.5-i.

In 1583, for example, it was decided at a session of sewers in Canterbury that the level of Whitstable could only find protection from salt water inundation in the "erection of a proper sea wall and sluice", this suggestion forthcoming from the evidence of land owners and occupiers and acted upon by the commissioners.[2] In 1588, a controversy arose among the commissioners of sewers for Holland, Lincolnshire, concerning the draining of low grounds in the Whaplode-Holbeach region. Some maintained that the existing ditches, which ran north and south, were sufficient for the purpose while others proposed the creation of new cuts to cross east and west, linking the old. Lord Chancellor Hatton, Lord Treasurer Burghley, and Mr. Secretary Walsingham instructed several informed individuals to mediate in the affair and, in consultation with the commissioners, to "discerne which of the two courses [was more] approoveable for the generall state of the country".[3] No thought was given to the legality of one plan as opposed to the other; it was plain that the choice was to be made strictly on grounds of convenience and practicability.

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[1] Callis, pp. 92-94. [2] CSP-Dom., 1595-97, p. 223.

[3] Owen, 3:107-8.

In 1604, commissioners of sewers for Fleet, also in the Holland district, decreed that a drain be made for drying marshes in the area.[1] Ten years later at Terrington, Norfolk, sewers commissioners proposed the abandonment of existing banks which shielded the town from the sea in favour of building an entirely new one in a better location, and the project drew support from the townspeople.[2] In 1613, the privy council was approached by petitioners from the Isle of Ely. They not only requested that an old drain be re-opened to help control flooding of the River Ouse, but also "that one other drayne more be made and perfected, twenty foote wide, and imbanked on either side". In addition, they asked "that a drayne begunn by Lawe of Sewers beneath Ely may be perfected and brought to Harrimeare".[3]

It is ironic that inhabitants of the Isle of Ely should sanction the digging of new drains, especially those affecting the River Ouse, because it was from this area and regarding this river that the major challenge came against the right of the sewers commissions to instigate new works. Citizens in the Isle of Ely had undergone a considerable change of heart between 1609 and 1613, for we have evidence that on the earlier occasion there was opposition to a new cut planned by sewers commissioners.[4] This was part of the same altercation which included the above mentioned dispute over taxation,[5] and together with it was reviewed by Coke, Daniel, and Foster of the common pleas sometime in the fall of 1609.[1]

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[1] CSP-Dom., 1603-10, p. 165. [2] APC, 1613-14, pp. 382-83.

[3] Ibid., pp. 269-71. [4] CSP-Dom., 1603-10, p. 550.

[5] supra, pp. 124-26.

Although we are treating taxation and new works as separate issues, they shared common ground in the Case of the Isle of Ely and thus received equal attention from the justices. From the government's point of view, the answer returned for the new works segment of their question was every bit as hard to swallow as that given for taxation. However, there were differences. Each half of the two-part opinion served to shackle the sewers commissions, especially in times of emergency, but the denial of their supposed rights in the area of new works was not quite so categorical as that regarding general taxation. Because of the recognition of a grey area, the explanation in this instance was longer and more involved than in the other.

Coke's report of the case began by asserting that the pre-statutory commission of sewers did not allow the building of new works but that the 1427 statute changed this through the addition of the words "et alia". Thus, the relevant clause reads:

> . . . to repair the said Wall, Ditches, Gutters, Sewers, Bridges, Causeys, and Wears, in the Places necessary, and the same or *other*, as often and where shall be needful to make of new.[2]

By Coke's reasoning, "the same" referred to the "said Walls, Ditches" and so on, in other words the old walls, whereas "other" left the door open for the building of different walls or the cutting of new sewers.[3] Nevertheless, according to Coke this progress was undone by the 1532 statute because these key words, "et alia", were omitted, thereby providing only for the "making like new" of already existing walls and sewers. Oddly enough, after reaching this conclusion Coke then proceeded to negate it in part by defining situations where it did not always apply. He allowed that "some small alteration in respect of the natural change of the current, or otherwise for the public good" could be made when an old sewer was being refurbished. Furthermore, if an old wall was destroyed it could be replaced by another, even on a different location, for this was "but a new making of the old wall in a place by inevitable necessity more fit than the other." However, this concession to the commissioners was tempered with the qualification that "if by the timely reparation of the old wall, the extreme danger may be avoided, no other ought to be made".[1]

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[1] 10 Co. Rep., 141a.

[2] 6 Hen. VI, c.5. The italics are the author's.

[3] 10 Co. Rep., 141b.

A major concern voiced by Coke and echoed by Callis was that the building of new works might be undertaken at the behest of, and for the profit of, certain powerful individuals. The chief justice suggested that

> . . . when new inventions are proposed, . . . if they are apparently profitable, [to the commonwealth] no owner of the land there will deny to make contribution for his advantage: and then it ought to be made by their voluntary consent and charge, and not by constraint by force of the said commission of sewers . . . but sometime when the public good is pretended, a private benefit is intended.[2]

In effect, he was saying that new works were basically warrantable if they were for the good of the entire community, and if the community in turn evinced its belief in the value of a project by a willingness to contribute towards it. Callis expressed a similar sentiment.

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[1] 10 Co. Rep., 142a-142b. [2] Ibid.

> Therefore in my Opinion, . . . it should lie in the power of the Commissioners of Sewers, upon just and urgent occasions and considerations, to make Orders and Decrees for erecting and making of new Banks, new Walls, . . . and other necessary Defences . . . with this caution, That under the pretence of the Commonweal a private man's welfare be not intended to the charge, trouble and burthen of the Countrey.[1]

When viewed from the perspective of Callis and Coke, the about-face of the citizens of the Isle of Ely between 1609 and 1613 seems more understandable. Perhaps they were not so much opposed to new works on principle, but rather the particular proposal confronting them in 1609. It should be remembered that in the earlier instance the issue was exacerbated by a tax assessment which was seen by the inhabitants as both illegal and obnoxious. Worthy of note is the fact that Coke in his report on the entire case came out much more strongly and absolutely against the commissioners' implementation of a general tax than he did against new works as a basic concept. This serves to re-emphasize the point that although the latter merited separate comment in the 1616 order, the taxation question remained the true Pandora's box for the sewers commissions.

A look at the other two of the four "principall heades" of the order will confirm that this was indeed the case. However, discussion of both these issues will be postponed for the moment, because they contended with eventualities that could only arise if and when malfunction afflicted the regular operation of the commissions. The latter has been partitioned into three stages: inquiry; assessment; and finally, the action resulting from the first two-thirds of the process. A statutory definition of the general purpose of this tertiary phase has already been given.[1] Succeeding passages in the Form of the Commission of the 1532 act expanded upon and gave detail to this theme, listing the powers the commissioners could wield as they strove to "refourme repayre and amende" the sewers.

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[1] Callis, p. 103.

First, they were authorized to "depute . . . kepers bailiffes surveyors collectours expenditours and other mynisters" to assist them with their work.[2] A later clause in the statute also provided each commission the right to appoint its own clerk.[3] The officers of the commission went under different names and were present in different numbers according to local practices. Whatever form they appeared in, they all shared the common trait of being the active arm of the sewers commission. Their responsibilities included the collection of taxes, the application of collected moneys to projects, and even the distraint of defaulters.[4] Because they handled funds under the control of the commission, their accounts were subject to review by the commissioners and any discrepancies could be punished by the taking of distress.[5] There was no specification concerning remuneration for these men but we have the example of William Hayward, who in 1622 was paid £100 "for surveying the fens . . . in various counties in England."[6] However, this was probably a fee awarded to a surveyor retained on an exceptionally lucrative contract. The stipend paid to the officers of a commission was liable to be less than that for the clerk, which was 2s. for each day spent in the business of the commission, and certainly less than the 4s. *per diem* allotted the commissioners.[1]

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[1] supra, p. 131. [2] 23 Hen. VIII, c.5-i.

[3] 23 Hen. VIII, c.5-viii. [4] Kirkus, pp. xxxv-xxxvi.

[5] 23 Hen. VIII, c.5-i. [6] CSP-Dom., 1619-23, p. 428.

The clerk of the commission of sewers was crucial to the proceedings of the court of sewers,[2] in much the same fashion as the clerk of the peace was for the quarter sessions.[3] However, it is doubtful that he spent much of the year in the service of the commissions, for we find that the clerk for Surrey and Kent was awarded a mere ₤4 during 1572.[4] By 1615, John Huggett, the clerk for Essex, was still only receiving ₤8 yearly for his labours.[5] Nevertheless, the position was both important and attractive. This is evinced by the impressive letters of reference written on behalf of John Jackson, who applied for the vacant clerkship in Holland, Lincolnshire, in 1586. They were penned by no less exalted personages than Lord Burghley and the earl of Lincoln.[6]

The commissioners could also commandeer whatever construction materials and labour, human or animal, they deemed requisite for their work. Although they were instructed to make due recompense for such appropriation, the price paid was to be determined by the commissioners themselves.[7] In 1567, in Elloe, Kirton, and Skirbeck, wapentakes of the Holland district, labourers for the diking of the River Welland were paid 4d. a day with a boarding allowance of 2s. 8d. per six-day week.[1] The crown bore the charge in this enterprise because it was the landowner, but one can imagine the frustration of those toiling on sewers projects whose wages had come out of their own pockets via the collector for the sewers assessment. A more intense form of negative emotion must have been experienced by sixty-three workmen of Dagenham, Essex, whose wages were witheld by the commissioners of sewers. In this instance, a dispute arose which remained unresolved for several years in the early 1620s, and there was at least one other occasion during the same general time period when sewers commissioners apparently did not part with moneys owed by them for services received.[2]

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[1] 23 Hen. VIII, c.5-viii. [2] Kirkus, pp. xxv-xxvi.

[3] T. G. Barnes, The Clerk of the Peace in Caroline Somerset (Leicester: University Press, 1961), pp. 20-21.

[4] Kirkus, p. xxv. [5] APC, 1615-16, p. 145.

[6] Owen, 3:104. [7] 23 Hen. VIII, c.5-i.

The resources at the command of the sewers commissioners were the means by which their decisions could be implemented. It was in the issuing of orders and the making of their will known to the public that the judicial and legislative strengths of the commissioners were embodied. They were empowered to "make and ordeyne statutes ordenaunces and provysions . . . for the savegarde conservacion redresse coreccion and reformacion of the premisses". In this exercise, the standards to be observed were "the lawes and customes of Romney Marsshe . . . , or otherwise by any wayes or meanes afteyr [their] owne wisedomes and discrecions". They were also "to here and determyne" all suits and complaints brought before them regarding sewers, and in so doing adhere to the same principles.[3]

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[1] Owen, 3:18-21.

[2] CSP-Dom., 1619-23, pp. 475, 486; APC, 1615-16, p. 145.

[3] 23 Hen. VIII, c.5-i.

All "writtes precepts warrauntes or other commandementes" made by virtue of the commission were to be directed to "Shireffes Bailliffes and all other ministres officers and other personnes" at certain times and places which were to be pre-designated by the commissioners. Advance notice was also to be given for any surveying or viewing of sewers by the commissioners or their officers.[1] The sheriffs were commanded to empanel juries and to ensure that the jurors were present at the time and place specified by the commissioners. Coupled with this was an enjoinder to all other county officials to aid the commissioners in the "due execucion of this our Comission."[2] In almost every instance the instructions in the preceding list were broadened with the concession of discretionary capacity to the sewers commissioners. This feature in itself served to endow the commissions with a power that was difficult to define and restrict. However, the passage wherein lay their greatest potency has yet to be discussed. Situated near the end of the Form of the Commission, just before the directives to the sheriffs and other officials, it had the greatest bearing on the last two of the privy council's four 'headings'.

> And all suche as ye shall fynde negligent gaynsayeng or rebelling in the said workes reparacions or reformacion of the premisses, or negligent in the due execucion of this our Comission, that ye do compell them by distresse fynes and amerciamentes or by other punysshementes waies or meanes which to you . . . shall seme most expedient, for the spedye remedie redresse and reformacion of the premisses and due execusion of the same.[3]

This instruction was buttressed by one of the supplementary clauses which came after the Form of the Commission. If punishment by amercement, fine or taking of distress seem to have been strong weapons placed in the hands of the sewers commissioners, the device awarded them by clause v. borders on the amazing. In the case of non-payment of taxes or other charges assessed by the sewers commissioners against any lands, tenements, or hereditaments within their jurisdiction, they were given the extreme power to

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[1] 23 Hen. VIII, c.5-i. [2] Ibid. [3] Ibid.

> . . . decree and ordeyne the same londes tenementes and hereditamentes frome the owner or owners thereof and thir heires . . . , to any personne or persones for terme of yeres terme of liffe in fee symple or in taile for payment of the same lotte and charge.[1]

Any such decree became permanently binding and removable only by act of parliament if it was given the royal assent and certified in chancery under the privy seal and the seals of the commissioners.[2] It was also expressly stated that these decrees were binding on the king as well as his subjects.[3]

We need go no further than the statute itself for an idea of the severity of this measure. A distinction was drawn between the general laws, decrees and ordinances of the commission, and these extraordinary ones which could permanently dispossess a man and his heirs of their estates. As of 1532, the former were to stand only as long as the commission which created them, while the latter had an aura of immutability about them. The gravity of the latter type of decree is evinced by the fact that a more complex and demanding administrative process was required to bring it into effect.

An interesting postscript to this legislation came in 1571.

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[1] 23 Hen. VIII, c.5-v. [2] Ibid., c.5-v, xiv. [3] Ibid., c.5-vi.

It will be remembered that the statute of that year extended the life of standard laws, decrees and ordinances.[1] Evidently, in the intervening years since 1532 there had been some confusion as to the necessity for royal assent and certification in chancery of commissioner's decrees. Perhaps there were some who, endeavouring to impede the work of the commissions, had put forward the claim that all sewers decrees needed such extensive paperwork to make them binding. The statute stated unequivocally that, for those of the 'ordinary' variety, no such requirement existed. However, these special procedures were not eliminated for decrees which performed that radical step, the deprivation of hereditaments.[2]

In spite of the explicatory efforts of the 1571 statute, the issue of royal assent and certification remains somewhat clouded. Strangely enough, any residual misconceptions to be found are in the accounts of modern observers. Professor Darby, whose sin was perhaps one of omission rather than commission, described the process of royal assent and certification in chancery simply as that which "might [make] permanently binding" laws, decrees and ordinances "made by the commissioners, which would otherwise have expired on the termination of their commission".[3] This is, to say the least, a rather innocuous and incomplete representation of a legislative instrument of such momentous consequence. The Webbs failed to distinguish between the two types of decrees in a similar fashion, and they compounded their mistake by contending that in 1571 "this peculiar use of the Royal Assent was dispensed with".[1] Perusal of the statute alone will expose this assertion as fallacy, but all doubt is removed by a 1604 entry in the Calendar of State Papers: "Royal assent to ordinances and decrees made and certified in the Court of Chancery, by virtue of a commission of sewers, 38 Eliz.".[2]

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[1] supra, pp. 64-66. [2] 13 Eliz., c.9-i, ii.

[3] Darby, Draining of the Fens, p.5.

We may make two inferences from this item, the first and most obvious being that there were decrees made after 1571 which were given royal assent and certified in chancery. The second has to do with the apparent paucity of other references to decrees bearing royal assent and certification. One might conclude that, although the commissioners were at times over-zealous in flexing their judicial and legislative muscles, the use they made of this, their greatest strength, was both infrequent and circumspect.[3] Admittedly, this was probably due more to prevalent realities than any intrinsic sense of justice and restraint on the part of the commissioners. The hue and cry raised by their questionable methods of taxation and authorization of new works would have increased tenfold had they often resorted to the extreme of divesting a man of the basis of his wealth and social standing. The 'ordinary' powers possessed by the commissioners were in most cases more than adequate and, when compared with those held by other commissions, by no means commonplace.

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[1] Webb and Webb, Statutory Authorities, p. 24. It should be pointed out that Professor Darby's mistake on the question of royal assent was not as extreme as that of the Webbs simply because, while making direct use of their words, phrases, and ideas on the subject, he appears to have edited at random some of their comments and so not repeated their argument in its entirety.

[2] CSP-Dom., 1603-10, p. 132.

[3] The involvement of the undertakers in fen drainage would add to the significance of this type of decree, and in some instances, lead to its abuse. infra, p. 177.

Bankruptcy commissions had the right to "apprehend the bankrupt's person and to dispose of his property to the benefit of the creditors."[1] While the end result in this case was similar if not identical to that of the special decrees of the sewers commissions, the bankruptcy commissions could only work towards this end within clear limitations. It was a punishment applicable solely to those who qualified as bankrupts, which classification "followed from a particular kind of action committed by a definable man in a stipulated situation."[2] In other words, this was not a tool to be used at the discretion of the commissioners but part of a specific procedure for bankrupts prescribed by statute. Also noticeably absent from the bankruptcy commissions was the independent legislative capacity that we have come to associate with the sewers commissions. The former could declare a debtor to be bankrupt in an interpretation of the standards set by statute, but the ability to make laws, decrees and ordinances on their own merit seems to have been beyond them.[3]

The commissions for charitable uses had an aptitude more akin to that of the sewers commissions yet they were still lacking in some areas. For example, they could make decrees, which had to be certified in chancery, but these decrees had no fixed period of duration and could be made void at the discretion of the lord chancellor.[4] Most important of all, the commissioners for charitable uses had no direct means of enforcing their decrees but instead had to look to the lord chancellor to commit recalcitrants for contempt or to order the taking of distress.[1]

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[1] W. J. Jones, "English Bankruptcy," p. 29.

[2] Ibid., p. 24. [3] Ibid., p. 29. [4] 43 Eliz., c.4.

It was in this area that the 'ordinary' powers of the sewers commissions were so great, perhaps exceeding even those of the commission of the peace. The 1532 statute had given sewers commissioners the right to fine and amerce those who resisted their orders and decrees, and if these measures did not prove satisfactory, to distrain the properties of transgressors. It will be remembered that included with this accordance to the commissioners was what amounted to a *carte blanche*, for they were allowed to punish not only by the means expressly stated but also by any other which to them seemed expedient.[2]

This most puissant facet of the sewers commissions constitutes the link between the taxation question and the final two 'headings' of the privy council order. Punitive action by the commissioners was only necessary when their process of assessment and collection did not run smoothly. The latter was usually due to the defiance of an aggrieved citizenry, and so we can see castigation by the commissioners as a symptom of that underlying germ of discontent, the unresolved dispute about methods of taxation. In the manner of a chain-reaction, the issues embodied in the last pair of 'headings' were a by-product of the punishment inflicted by the commissioners.

Robert Callis had condoned expediential taxation on the grounds that any victim of inequity could always seek restitution through litigation.[1] This posed a problem for the commissioners and the privy council; hence, one of the two 'headings' complained that "accions of trespasse, false imprisonmentes, or other processe at the common law have been brought against the Commissioners or some of their officers and ministers for executing their decrees and warrantes".[2] A broad hint as to how the commissioners were countering these suits and any other opposition lies in the other 'heading'. The order attempted to refute the ostensibly erroneous assumption that the sewers commissioners did not have "power sufficient to committ to prison persons refractory and disobedient to their orders, warrantes, and decrees".[3] These two statements amount to an admission on the part of the privy council that the commissioners were sustaining debilitating attacks against their industry. We may identify these attacks as consequential rather than causal, but nonetheless they were the primary stimulus that stung the council into precipitate action. Because of the attendant legal proceedings, they also helped to propel the sewers commissions into the limelight as part of one of the most evocative controversies of the day. Caught up in the cut-and-thrust of a political duel between Sir Edward Coke and his adversaries, the issues surrounding the sewers commissions outgrew their basic stature to become manifestations of both public policy and private interest on the grandest scale.

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[1] Gareth Jones, Law of Charity, p. 51. [2] supra, p. 140.

Before they can be examined within the greater context, these issues should be traced back to the narrower confines from whence they originated. One of the early indications that lawsuits were reaching problematic proportions came in a letter of October 1609, from sewers commissioners in the Isle of Ely to Lord Treasurer Salisbury. It referred to the reluctance of the sheriff to levy taxes imposed by them, for fear that he might be brought under suit. They expressed the hope that "their public duties may not involve their private estates", thus revealing apprehensions identical to those of the sheriff.[1] It is probably little coincidence that the date of this correspondence was extremely close in time to Coke's 'hearing' of the Case of the Isle of Ely, which must have served as an inspiration for opposition along these lines.

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[1] supra, p. 130. [2] APC, 1616-17, p. 58. [3] Ibid.

By 1613, the privy council's attitude towards obstructionists had hardened. The government showed its cognizance of the increasing difficulties confronting the commissions in the previously mentioned letter of November 1613.[2] This admitted somewhat euphemistically that "workes (though for the publique good) seldome passe without opposicion", and so the commissioners were instructed to "bynde such of them [any refusing to submit to orders and decrees or pay taxes] as you shall thinke fitt to appeare before us . . . to answeare the same."[3] While there is no mention here of legal actions being instituted against commissioners by private citizens, the situation was obviously becoming serious enough for the privy council to seek direct involvement with the disciplinary activities of the commissions. Significantly, the greatest evidence of the use of this tactic appears in the fall of 1616, in the period immediately preceding the issuance of the council order.

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[1] CSP-Dom., 1603-10, p. 550. [2] supra, p. 126.

[3] APC, 1613-14, p. 271.

On 12 October, Thomas Pigg and Robert Homes--by their names most probably simple crofters--stood before the council, having been bound over by the sewers commissioners of Cambridgeshire. It is interesting to note that although they were considered to have made restitution simply by their appearance, they were "enjoyned to attend their Lordships at their severall meetinges, untill by order from them they shalbe dismissed."[1] This in itself must have been a substantial punishment for these men, for a protracted stay in London would constitute time lost from their work, and no doubt made strenuous demands on their finances. On 3 November, Edward Potto was brought by warrant before the council, having been charged with contempt against commissioners, also in Cambridgeshire. Having duly admitted his guilt and "submitted himself as becommeth him", he was dismissed and instructed to make like submission to the commissioners against whom his offence had been committed.[2]

It was at this same time that the combined issues of lawsuits against commissioners and imprisonment sprang to the fore. On 13 October, 1616, the privy council ordered Sir Francis Fane to acquaint Attorney-General Bacon with details concerning complaints made by the commissioners of

> . . . divers persons not only refusinge to obey such orders and decrees as the said Commissioners had thought meete to sett downe for the good of the country, . . . but also commenced divers suites at the common lawe without privitie or leave of the said Commissioners, against some of the Commissioners themselves, and other officers and persons chosen

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[1] APC, 1616-17, p. 39. [2] Ibid., p. 54.

> by the said Commissioners for executinge the said decrees . . . .[1]

Some of the offenders had already been incarcerated by the privy council, and it was announced that warrants would be sent out for others whose names had been brought to their attention.[2]

One of the "divers persons" to which the statement undoubtedly referred was William Hetley, by all accounts a farmer in the vicinity of Peterborough.[3] His determined and prolonged battle with the sewers commissioners of Northamptonshire and Huntingdonshire exasperated the privy council and caused both him and his adversaries to spend the better part of four years either in court or in prison. The story of Hetley's fierce resistance to what he obviously felt was a tyrannical bureaucracy encompasses almost all the issues mentioned in the preceding pages. Indeed one could easily believe that Sir Francis Bacon drafted the 1616 order with William Hetley specifically in mind.

The initial events probably occurred sometime in 1613 as by

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[1] Ibid., p. 44. Fane was already in attendance upon the privy council, having been deputed by the sewers commissioners at Peterborough to make their plight known. Their choice of Fane as a representative was a logical one considering his reputation. John Manningham had described him as a "yong gent. of great hope and forwardnes, verry well affected in the Country". Robert P. Sorben, ed., The Diary of John Manningham (Hanover, N. H.: The University Press of New England, 1976), p. 43. Fane was politically experienced, having sat in three parliaments by 1616, and well-connected, being the son-in-law and fellow commissioner of the venerable Sir Anthony Mildmay. George E. Cokayne, The Complete Peerage, ed. Geoffrey White (London: The St. Catherine Press, 1959), 12-pt. 2:566-67; APC, 1616-17, p. 59. The latter was the one-time royal ambassador to the court of Henry IV of France, and son of the great Elizabethan privy councillor and chancellor of the exchequer, Sir Walter Mildmay. DNB, 13:376; infra, pp. 150-51.

[2] APC, 1616-17, p. 44. [3] Ibid., 1617-19, p. 161.

Hilary term 1614, (which would be late January, early February) the case had found its way into the king's bench.[1] The village in which Hetley resided had been assessed a sewers rate of ₤5, and when this was not paid his cattle were distrained by the commissioners for the amount so that the necessary work might proceed. He brought an action of trespass against them in the king's bench. Led by Sir Anthony Mildmay,[2] the commissioners responded by committing Hetley to Peterborough jail on a charge of "contempt and refusall to submitt himself to such ordinances and lawes of sewers as were there made for the generall behoofe and safety of the contry".[3] Sir Edward Coke and his fellow king's bench justices found in favour of the plaintiff in the trespass suit. Their decision was based on that in Rooke's Case which, it will be recalled, upheld statute in denying commissioners the right to make an individual pay for works that benefited an entire town.[4] Nonetheless, Hetley was told by the commissioners that he would remain in prison until he abandoned his successful action against them.[5] However, he secured his release with a writ of *habeas corpus* issued out of the king's bench.[6] By virtue of this writ attachments were given against the sewers commissioners, with Sir John Boyer and Sir Anthony Mildmay being specifically named. Those who were present in king's bench on the appointed day in the spring of 1615[7] were sentenced to prison and fined ₤200, although they were later given a royal pardon.[8] Mildmay failed to appear and "an indictment for a

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[1] Cro. Jac., 336. [2] Callis, p. 173. [3] APC, 1617-19, p. 161.
[4] supra, p. 123. [5] Cro. Jac., 336. [6] Callis, p. 173.
[7] Cro. Jac., 336. [8] Callis, p. 173.

*praemunire* was drawn against him . . . for his illegal acting as a commissioner". He too was fined but eventually pardoned.[1]

One might think that a victory for Hetley would mark the end of the affair, but this was not to be the case. Perhaps irked at the fact that the commissioners had only received a token rap on the knuckles, or perhaps through sheer obstinacy, he refused to withdraw the original suit. The king's bench decision had awarded him £220 in damages plus costs, but the privy council then entered the fray on the side of the commissioners and re-committed Hetley for his insistence that the judgment be carried out.[2] On 8 November, the same day in 1616 that saw the issue of the momentous order, a letter was sent from the council to commissioners in the fen counties, addressed to Fane and Mildmay among others. It spoke of the measures taken against "those disobedient persons, who were complayned of therof for resisting your decrees, and for molesting you and your officers with unjust suites", and explained that they had been made examples of, obviously through imprisonment, which caused "them to submitt themselves, and to release their actions." This was to stand as a "warning for others to take heed of the like contemptes".[3]

The rather smug-sounding epistle also contained news of an undaunted Hetley, who alone remained unrepentant and still languished in capitivity, probably having been imprisoned for almost two years by this time. The council righteously proclaimed that his "behaviour in this business being so insolent and without sufficyent ground, either in justice, or reason, wee shall not hastily release him, untill he humble himself and release as the rest have done."[1] Such vilification must have seemed pure cant, not only to Hetley, but to Coke and the king's bench justices as well. Evidently he eventually tired of confinement and gave the submission demanded of him by the council, for we find him at large and once again answering charges before the court of sewers in late 1617 or early 1618. John Davie, the jailer of Peterborough, had petitioned the commissioners that Hetley be forced to pay him a fine of approximately £30 to cover the cost of housing the latter in his jail. The commissioners granted the petition but reduced the sum to £20 and ordered Hetley to comply. He was thereupon bound over to appear before the privy council to answer charges of contempt.[2] The last we hear of the matter is a council letter of June 1618, acknowledging Hetley's prior contrition and consequently recommending him to the "good favour of the Commissioners for some such moderacion and abatement of the summe."[3]

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[1] Cr. Jac., 336. [2] APC, 1617-19, p. 161.

[3] Ibid., 1616-17, p. 59.

Apparent throughout this entire series of events is the wide disparity between the executive and judicial concepts of justice. The letter cited above amounts to a summary of the Hetley case by the privy council, and in it they gave as justification for his imprisonment the order of 1616.

> Upon complainte whereof to this Boarde Heatley was comitted to the Gatehouse here, as he well deserved, untill he had made a full release and discharg of the foresaid judgment to all parties interessed, according to an order made at this Board the 8 of November 1616 grounded upon many speciall and waightie consideracions both of law and state . . . .[4]

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[1] APC, 1616-17, p. 59. [2] Ibid., 1617-19, p. 139.

[3] Ibid., p. 161. [4] Ibid.

The affair incorporates almost every problem recognized by the order, and it also illustrates the solutions to those problems that the order put into effect. The king's bench had found in favour of William Hetley because, according to statute and legal precedent, his rights as an individual had been violated. However, those rights had not been violated by other individuals--Sir Francis Bacon and his fellow privy councillors--instead they had been abrogated by a policy of state, one fashioned by the executive arm of the government with the benefit of the country as its concern. When viewed in this context, the steps taken by the privy council, particularly as manifest in the 1616 order, ascend to a higher plateau than simply one of sewers administration. Similar conclusions apply to the opinions of the judges, especially Coke, as they were expressed in the Case of the Isle of Ely and Hetley vs Boyer, Mildmay, et al..

The greater issue is best introduced by a statement of Professors Louis Jaffe and Edith Henderson. "Every State --at least in the western world --has found that some type of judicial institution is indispensable for the control of administrative action."[1] The judicial institution necessary for such control was available in seventeenth-century England. In dispute amongst the great legal and political minds of the early decades of the century was the nature of the role that this form of judicial review could play in the regulation and influencing of government policy. A partial answer to the question can be seen in the assertion by Professor's Jaffe and

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[1] Louis Jaffe and Edith Henderson, "Judicial Review and the Rule of Law: Historical Origins," Law Quarterly Review 72 (1956):345.

Henderson that "the theory of judicial review was part, of course, of that system of ideas which Coke threw up against the aggrandisement of the executive."[1] This is a somewhat hazardous generalization because of the fact that Coke as a privy councillor was a member of the executive, but it does have merit when applied specifically to the sewers commissions. Consistently reappearing throughout our discussion of their powers is the dim view taken by the courts whenever the commissioners tried to stretch the law. While often encouraged by the privy council, and almost always justifiable by the public interest, the use of discretion by the commissioners was successfully challenged at the common law. The attitude of the courts towards discretion has already been described,[2] but a reminder from Coke will serve to place it within the present context. In his Institutes, Coke concluded the chapter on sewers commissions in unequivocal terms.

> Lastly, this certain, that neither the Commissioners of Sewers, nor any other, have such an absolute authority, but that their proceedings are bound by law.[3]

Although it might seem that Coke had stated the obvious, it should be remembered that he was writing in retrospect. From his vantage point of fifteen years later, the events of 1616 must have posed a refutative threat to his tenet and hence his need for such an adamant reiteration of what appears to be an unquestionable truth. If this was Coke's answer to the question of judicial review, that given by the privy council was inherent in the 1616 order. This directive took positive and somewhat drastic steps to ensure that the sewers commissions could operate in relative autonomy. We have looked at the problems it was designed to solve, but other than a few allusions we have not yet detailed the measures it proposed and their resultant effect. Doing so will not just provide the final particulars in the account of the early seventeenth-century sewers commissions; it will also help to depict the outcome of the debate on judicial review and its consequences for the common law courts.

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[1] Jaffe and Henderson, "Judicial Review," p. 348.

[2] supra, pp. 117-18. [3] Coke, 4 Institute, p. 276.

The "four principall heades wherein the extent of the commission is questioned" were each countered with the justification that the council's conclusions were warrantable by the "supreame reason above all reasons, which is the salvacion of the Kinge's landes and people".[1] It was only right that the commissioners could erect new works because

> . . . it can neither stand with lawe, nor common sense and reason, that in a cause of so greate consequence the law can be so void of providence as to restrayne the Commissioners of Sewers from making newe workes to stopp the fury of the waters . . . .[2]

The same argument was given for the commissioners' right to tax generally, "without attending particular survey or admeasurement of acres, when the service is to have speedie and sodaine execucion". Also, a commission of "so highe a nature and of so greate use to the commonwealth" should not lack a means of "coercion for obedience to their orders, warrantes, and decrees". Finally, it was decided that "it wilbee a direct frustrating and overthrowe to the authoritie of the said Commission" if those in its service "shall bee subject to every suite at the pleasure of the delinquent in his Majesty's courtes of common lawe".[3]

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[1] APC, 1616-17, p. 58. [2] Ibid. [3] Ibid.

It was therefore ruled that henceforth, previous legal decisions notwithstanding, sewers commissioners would proceed about their business at their own discretion, doing whatever they deemed necessary to get the job done. Recalcitrants who had already been committed for bringing action against the commissioners would remain incarcerated until they withdrew their suits. The commissioners, who might otherwise become high-handed with this resounding confirmation of their hitherto questioned powers, were warned to take care "that there bee no just cause of complaynt given by any abuse of the sayd Commission."[1] With the exception of this admonition, the order was a sweeping removal of those restrictions most hampering the commissions. The letter of the same day which dealt with the Hetley case reinforced the point. The commissioners were exhorted to

> . . . goe forward in the [business of sewers], and not to bee discouraged by any newe opinions or conceites of lawe, muche lesse by the opposicion of such common and meane persons, as easily spurne against all authority . . . .[2]

The council would continue to force the abandonment of any suits against commissioners, bonding for appearance and the threat of imprisonment usually achieving the desired result. The two most immediate victims of the strategy were Thomas Trench of Norfolk and Zachary Wilbore of Yorkshire's West Riding,[3] and there were more to follow over the ensuing decade.[4]

This tactic seems the most outrageous feature of what appears to be a totally despotic policy. Expressed only a few years later,

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[1] APC, 1616-17, p. 58. [2] Ibid., p. 59.

[3] Ibid., p. 128; Ibid., 1617-19, p. 159.

[4] Henderson, Administrative Law, pp. 33-34.

Callis' great faith that the law would provide due recourse for those receiving unjust sewers tax appraisals must lose its credibility by this action of the privy council. To reiterate, he opined that a "Tax . . . generally imposed upon the Town is good", one of his reasons being that if an inhabitant's property was distrained because he refused to pay a faulty assessment, he could bring an action of trespass against the distrainer and regain his lost goods.[1] The privy council had removed this option from the private individual. However, their order was not quite so devoid of justice as initial indications would lead us to believe. The privy council did allow that any who felt wronged by the sewers commissioners could take their grievance before the court of sewers or, if need be, all the way to the council itself.[2] The sincerity of this concession is evinced by the fact that on several occasions the privy council interceded on behalf of local citizenry, requiring sewers commissioners to rescind decrees over which complaints had arisen.[3]

The privy council emerged the undisputed victor in the battle over the powers of the sewers commissions. Their policy may have been autocratic but it must be credited with achieving the end for which it was designed. Things ran more smoothly for the commissions and it was in the main due to the council's success in keeping the commissioners out of court and on the job.[4] Events did not prove so pleasant for the other major protagonist in the conflict. By 1616, allegations that Sir Edward Coke stood in persistent opposition to the interests of the crown were beginning to bear what for him had to be noxious fruit.[1] We have already discussed the details appurtenant to the sewers commissions in Lord Ellesmere's charges against him.[2] Placed within the larger context, they were perhaps the only *bona fide* evidence of all that was produced in support of the accusation that Coke was weakening the power and jurisdiction of courts and commissioners. The Case of the Isle of Ely was cited specifically by Ellesmere when he contended that "the Chiefe Iustice in his reports hath scattered many suddaine opionions in Diminucion of the lawfull power of many Courtes". The lord chancellor, and as a likely result the king as well, felt that these actions posed "great danger and breedeth occasion of much Contempt in the inferior subiects".[3]

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[1] supra, p. 130; Callis, pp. 125-28. [2] APC, 1616-17, p. 58.

[3] Ibid., 1617-19, p. 205; CSP-Dom., 1611-18, p. 413.

[4] Henderson, Administrative Law, p. 34.

In addition to the point on courts and commissions, Coke was called to account for the reports he had given on three other basic topics: the rights of the church, the prerogative of the king, and the interest of the subject. He was unable to refute these charges to the satisfaction of the king,[4] but the latter's decision on 10 November, 1616, to remove Coke from the king's bench must be attributed to issues hidden behind the legal smokescreen put up by Ellesmere and Bacon. There were many reasons for Coke's downfall, his position on the *commendams* case and the enmity of the Villiers faction ranking highly, and not the least of which was his abrasive personality, described by John Aubrey as "so fulsomely pedantique that a school boy would nauseate it."[1] John Chamberlain also commented on the faults of the chief justice.

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[1] Spedding, Bacon, 6:86-87. [2] supra, pp. 128-29.

[3] Knafla, Law and Politics, pp. 305-6, 309.

[4] Spedding, Bacon, 6:87-88.

> The common speach is that fowre Ps have overthrown and put him down, that is Pride, Prohibitions, Premunire and Prerogative.[2]

The third "P" is the one that seems most pertinent to the sewers commissions. It will be recalled that Coke brought Sir Anthony Mildmay (the absent sewers commissioner in the Hetley case) to ground with a writ of *praemunire*. Professor Amnon Rubinstein's interpretation of Coke's use of *praemunire* in this instance is consonant with that given by Professors Jaffe and Henderson. They all saw it as a device intended by Coke to procure for king's bench the power of judicial review of administrative action.[3] He was employing *praemunire* in this role as a surrogate for the incompletely evolved writ of *certiorari* to quash. Although Sir George Croke's report of Hetley vs. Mildmay and Boyer added that a *certiorari* lay to king's bench, this was not at all an established fact at the time of the case.[4] *Certiorari* would eventually become one of the major foundations upon which the concept of judicial review was based,[1] but its power remained inchoate in the early decades of the seventeenth century.[2] Doubts about its jurisdiction still existed in 1642, as is proven by a somewhat equivocal decision of that year in the king's bench. In Commins vs. Massam, Justices Mallet and Heath could not agree over what effect *certiorari* had on a sewers commission. The former held that it did not apply because sewers decrees were returnable only to chancery. The latter maintained that as long as the case was one of law and not equity, in other words if the commissioners had done "anything without or against their Commission", the matter was relevant to king's bench. Chief Justice Bramston temporized, allowing that as the *certiorari* had been granted "we must decide the case as it is".[3]

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[1] Andrew Clark, ed., 'Brief Lives' . . . by John Aubrey (Oxford: Clarendon Press, 1898), p. 179.

[2] N. E. McClure, ed., The Letters of John Chamberlain (Philadelphia: American Philosophical Society, 1939), 2:34.

[3] Amnon Rubinstein, Jurisdiction and Illegality (Oxford: Clarendon Press, 1965), pp. 71-72; Jaffe and Henderson, "Judicial Review," pp. 352-54.

[4] Cro. Jac., 336.

It appears that *certiorari* as an instrument of judicial review was not commonly acknowledged at the time Coke was fighting his battle, and his makeshift tool did not prove operable. As Professors Jaffe and Henderson averred, from 1616 until 1643 (after Commins vs. Massam) "the courts [were] effectively excluded from control of the Sewer Commissions".[4] Private individuals had attempted some regulation through the use of damage suits. Coke had tried, using *praemunire*, but the privy council triumphed with the implementation of the policies developed prior to 1616 and made official in that year. Before leaving the subject a final point should be made. Professor W. J. Jones, in his discussion of the alleged manipulation of the common law courts by the government in the 1630s, has warned against making the mistake of drawing too clear a distinction between politicians and judges.[1] The same applies for our period. Any tendency to think of Coke as the champion of justice for the individual and Ellesmere or Bacon as the harbinger of government autocracy should be tempered by the realization that Ellesmere was a judge and that Coke played a part in government administration. The existence of a grey area between opposing sides is all too obvious. Professor Jones stressed that "established law and statute were also conceived to cover and maintain both the King's power and the subject's property."[2] Thus, legal interpretations could be and often were made on the basis of a political standpoint and Coke was just as guilty of this as the justices who were vilified by the Long Parliament over the ship money decision. While he was the virtuous upholder of the common law by issuing a writ of *praemunire* against an authoritarian sewers commissioner, Coke never hesitated to use a writ of *quo warranto* against the cloth monopoly of the Merchant Adventurers, an action which admirably served the interests of his king.

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[1] Jaffe and Henderson, "Judicial Review," p. 348.

[2] Rubinstein, Jurisdiction and Illegality, p. 62.

[3] Henderson, Administrative Law, p. 185.

[4] Jaffe and Henderson, "Judicial Review," p. 355.

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[1] W. J. Jones, Politics and the Bench: The Judges and the Origins of the English Civil War (London: George Allen and Unwin, 1971), p. 18.

[2] Ibid., p. 15.

# CHAPTER VII--CONCLUSION

## THE SEWERS COMMISSIONS AND FEN DRAINAGE

The 1616 order had a beneficient effect on the operations of the sewers commissions. However, it alleviated the symptoms rather than the underlying cause of their problems, and as the magnitude and ambition of drainage schemes burgeoned, the commissions became correspondingly less able to do the job demanded of them. The privy council had awarded a quasi-legal sanction to the commissions for the building of new works but their actual capacity for doing this, especially on a large scale, was another matter. A central theme running throughout the description of the function of the commissions has been their inability to do little more than maintain the *status quo*.

As members of the gentry, the sewers commissioners would not have had the technical knowledge necessary for the initiation of projects more complex than simple maintenance or improvement on an extremely localized basis. Their reliance on local inhabitants for information, financing, labour, and expertise, posed obvious difficulties in the eventuality of co-ordinated enterprises which involved several commissions and spanned county boundaries. As this type of scheme became more common, a need for direction from above prompted an ever-increasing involvement on the part of the privy council, the significance of which had been announced in no uncertain terms by the 1616 order.

Such was the case in 1618 when a joint commission was convened, with representatives from Northamptonshire, Lincolnshire, Cambridgeshire, Huntingdonshire, Norfolk, and the Isle of Ely. Its express purpose was the "regaineing of many hundred thousand acres of surrounded landes in those partes", but the commissioners from the various counties were at odds over several issues and appealed to the council for help with their endeavour. In response, the council deputed one of their clerks, Sir Clement Edmondes, to view the area in question with the commissioners and return with a report on the situation.[1] Edmondes attended a general meeting on 12 August, 1618, at Huntingdon, then traversed the level bounded by the Rivers Ouse, Welland, and Nene, and on 29 September submitted a long and detailed record of his actions and opinions to the privy council.[2] Edmondes' findings were referred to a committee which included such distinguished persons as the chancellor of the exchequer, the master of the rolls, and Sir Edward Coke.[3] In spite of the analytical efforts of Edmondes and the committee, administrative problems continued to plague this huge project. Eventually the conglomerate commission was broken down into smaller entities which were each better prepared to handle work in their own counties as a part of the whole.[4]

There are three major points from this episode which deserve emphasis. The first has to do with a change in the nature of privy council intervention in the operations of the sewers commissions.

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[1] APC, 1617-19, p. 177. [2] Ibid., pp. 291-98.

[3] Ibid., p. 292. [4] Ibid., pp. 313, 314, 350.

Hitherto, it had been primarily within the legal sphere, backing the commissions against challenges to their authority and generally infusing them with added power. Henceforth, the council would attempt to give an equal or even greater amount of assistance on an administrative and operative level. The foregoing incident is one of the first examples of council involvement in the actual planning of drainage schemes.

Secondly, there seems to have been little or no application of scientific expertise to the enterprise. Sir Clement Edmondes, the source of technical advice meant to be the basis for subsequent procedure in the area, was a well-respected but unobtrusive civil servant of long standing whose bent was for the study of classical literature and military strategy.[1] The need for qualified water engineers was becoming increasingly apparent, and England would soon turn to the Low Countries in search of skilled practitioners in this field.

Thirdly, and most important, is the fact that the project was one of the earlier manifestations of a new attitude towards drainage, particularly in the fen country, which would in turn effect a change in the role of the sewers commissions. Perhaps most illustrative of this innovative thinking was the difference between the preambles of the 1532 statute of sewers and a drainage statute passed in 1601.[2]

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[1] Millicent Barton Rex, University Representation in England, 1604-1690 (London: George Allen & Unwin, 1954), pp. 99-100, 132-33.

[2] 43 Eliz., c.11. This statute was entitled:

> An Acte for the Recoverye of many hundred thousand Acres of Marishes and other Grounds, subject comonlie to surroundinge, within the Isle of Elye and the Counties of Cambridge Huntingdon Northampton Lincolne Norffoke

The primary concern of the former was over the "daylye greate damages and losses . . . in many and divers parties" of the country and its stated purpose was to provide "spedye redresse and remedy" against such ruin.[1] In marked contrast, no references to damage, loss, or destruction can be found in the preamble of the 1601 act. Instead, the statute spoke of the "greate and inestimable benefite [that] would arise to her Majestie" and the common weal if drowned lands could be made "dry and profitable".[2] Hereafter, the key word associated with drainage would be 'profit'. Entrepeneurs within the ranks of both public officialdom and private ownership had begun to realize the tremendous potential for financial return which lay in the surrounded grounds of eastern England.

Of course, this idea did not just suddenly spring to mind in 1601. There had been thoughts bearing in the same general direction since the 1530s,[3] and the 1601 statute itself appears to have grown out of abortive efforts to produce a similar act in the previous parliament.[4] Progress towards a consistent and protracted attempt at

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> Suffolke Sussex Essex Kente, and the Countie Palatine of Durham.

It was not a statute of sewers and did not deal with the sewers commissions. Hence, it has not been treated as such by the author.

[1] 23 Hen. VIII, c.5-i.

[2] 43 Eliz., c.11-i.

[3] supra, p. 40.

[4] J.E. Neale, *Elizabeth I and Her Parliaments, 1584-1601* (London: Jonathan Cape, 1957), p. 363; J.C. Sainty, ed., *Further Materials From an Unpublished Manuscript of the Lords Journals for Sessions 1559 and 1597 to 1598* (London: House of Lords Record Office, 1965), MS no. 3:303.

land reclamation on the grand scale had evolved slowly over the latter half of the sixteenth century and would continue to do so over much of the seventeenth century.[1]

The target for investors and the scene of so many years of labour and frustration for the sewers commissions was the region on the east coast of England known as the fenland. The major and most continuous portion of this area centered around that intruding arm of the North Sea, the Wash, and was called the Great Level. According to Sir William Dugdale, the Great Level

> . . . extendeth itself from Walton and Toynton in Lincolnshire, through a good part of six Counties, viz. Lincolne, Norfolk, Suffolk, Cambridge, Huntendon, and Northampton; being in length no less than LX miles; and in bredth, from Peterborough in Northamptonshire, to Brandon in Suffolk, neer fourty miles . . . .[2]

Andrewes Burrell concurred with Dugdale's listing of the counties covered by the Level, and estimated its size to be 307,000 acres.[3] Sir Jonas Moore described it as

> . . . being of so vast an Extent and great depth of fresh Water lying therein, That the Moore is encreased by such standing of the Waters in some places from 10 to 20 foot deep; So that instead of the benefit which this Level might receive from their Overflowings, in case they had enjoyed its free and natural Passage, and good Outfalls, it hath been made for the most part for divers Ages an unhealthful Stagnation of putrid and muddy Waters; the Earth spungy, unfast and boggy, . . . .

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[1] The first two chapters of H. C. Darby's The Draining of the Fens provide an account of the developments in fen drainage over the timespan in question.

[2] Dugdale, History of Imbanking, p. 171.

[3] Andrewes Burrell, A Briefe Relation . . . (London: Francis Constable, 1642), intro..

Moore also spoke of the isolation and impoverished conditions of the Level's inhabitants.[1] Almost all contemporary reporters agreed that the fen country was indeed an ill-conceived part of creation and fit for neither man nor beast. Daniel Defoe probably voiced the opinions of many outsiders who like him had travelled through the fen country, when he declared his "longing to be deliver'd from Fogs and stagnate Air, and the Water of the Colour of brew'd Ale".[2]

The situation of the fens was such that they were subject to inundation from two different sources. The immediate area of the seacoast in the counties named was an open, flat belt of marsh, sand and silt which had been built up by the constant surgings of the North Sea and fresh water runoff from the interior. Just a few miles inland was the huge zone of water-absorbent peat that comprised the fens. This area was of lower altitude than both the coastal fringe and the dry uplands encircling it to the north, west, and south, and so it served as a catchment basin through which no escape could be had for fresh waters flowing towards the sea. Also, whenever the latter was agitated beyond its normal state, it broke in from the east over the narrow band of coastal flats and flooded the peat zone.[3]

The general principles of drainage that were believed at the time to offer the best solution to the problem were as follows. It was thought that gravitational flow of fresh water to the sea could be facilitated by the straightening, scouring, widening, and deepening of existing rivers and drains, and the cutting of new ones to link the major rivers or provide more direct routes to the coast. Also, the outfalls of the major rivers (where they discharged their contents into the sea) had to be freed of obstructive silt and protected against the influx of seawater and sand by the installation of sluice gates, which would only allow the outpouring of fresh water.[1] Unfortunately, there existed a major flaw in this reasoning which was not recognized until later in the seventeenth century. If increased gravitational flow of water to the sea was achieved, the desired drying effect on the fens would result; but when the peat dried it also compacted, and consequently the level of the fenland would drop even lower. Successful drainage performed in the above fashion was, in the long run, self-defeating.[2]

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[1] Sir Jonas Moore, The History or Narrative of the Great Level of the Fenns Called Bedford Level (London: Moses Pitt, 1685), pp. 10-11.

[2] Daniel Defoe, A Tour Thro' the Whole Island of Great Britain . . . . (London: Frank Cass & Co., 1968), 2:500.

[3] Darby, Draining of the Fens, pp. 23-26; Burrell, Briefe Relation, pp. 4-6.

Nevertheless, there was much confident talk about the fens in the early part of the century. When addressing the house of Commons in 1606, Sir Edwin Sandys urged the crown to invest in drainage projects because, by his estimation, it stood to reap £40,000 a year profit in such ventures.[3] The idea was broached to James I in the spring of 1606 and at the time he was too busy to give it his full consideration.[1] However, the private sector had already become involved in the big business of fen drainage. A number of projects were under way in the Isle of Ely by 1605, one of them headed by Chief Justice Sir John Popham and apparently involving Lord Salisbury as well.[2] The undertakers, as they were called, made their gains in the form of land contributed by the inhabitants who had benefited from their work. In Popham's case this amounted to some 130,000 acres.[3]

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[1] Burrell, Briefe Relation, pp. 6-8; L. E. Harris, "Sir Cornelius Vermuyden, An Evaluation and An Appreciation," Newcomen Society Transactions 27(1949-51):11.

[2] Harris, "Vermuyden," p. 13.

[3] Wallace Notestein, The House of Commons, 1604-1610 (New Haven, Conn.: Yale University Press, 1971), p. 201.

A surge of excitement over the potential value of recovered land caused far more optimistic predictions than that of Sir Edwin Sandys. In 1628, the famous Dutch engineer Cornelius Vermuyden suggested to Charles I that the Great Level, consisting of 400,000 acres by his count, could be made to turn a yearly profit of £600,000.[4] Subsequent events and the well-directed criticisms of Andrewes Burrell both showed this to be wild exaggeration,[5] but the general conception of the fens as an untapped source of wealth never died out. Sir Thomas Roe in his 1641 speech to the Commons on the decay of trade, the prevailing mood of which was pessimism, saw a ray of hope in the "new drained land in the fens." He felt that judicious use of this resource could be a factor in the revival of a slumping economy.[1]

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[1] HMC Salisbury, 18:131. James eventually came to think along the same lines as Sandys and in 1621 made declaration of his own financial participation in a fen project. APC, 1621-23, p. 3.

[2] Darby, Draining of the Fens, pp. 31-32; HMC Salisbury, 17:452.

[3] Darby, Draining of the Fens, p. 32.

[4] Andrewes Burrell, Exceptions Against Sir Cornelius Virmuden's Discourse for the Draining of the Great Fens . . . (London: Robert Constable, 1642), p. 1.

[5] Ibid., passim.

Unhappily for the undertakers and those who shared their enthusiasm for profit and progress, two major obstacles stood squarely in their path. One was the previously mentioned technical problem, which all but made it impossible for them to carry out their often extravagant promises of performance. The other was the open hostility and resistance of the fenlanders themselves. They felt, with some degree of justification, that the undertakers had deliberately painted an overly negative picture of the fens in order to procure official support for drainage projects. Although depicted as virtually useless by their detractors, to their inhabitants the fens were home. They had a viable economy, with a stubbornly independent populace who supported themselves primarily by fishing, fowling and the raising of livestock.[2]

The grievances of the fenlanders were perhaps best explained in a letter written by Lord Willoughby to the earl of Essex in late 1597, objecting to the proposed bill for fen drainage that would become statute in 1601. His main concern was that the people could lose much of their common land, which was used for grazing, because the "bill gives liberty to three sorts to dispose of it, viz., the owners, the engineer or drainer and some commoners, the common being thus drawn into three parts." Willoughby held little doubt as to who would get the lesser of the three parts.

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[1] J. P. Cooper and Joan Thirsk, eds., Seventeenth-Century Economic Documents (Oxford: Clarendon Press, 1972), p. 44.

[2] Joan Thirsk, Fenland Farming in the Sixteenth Century (Leicester: University College, 1953), pp. 26-28.

> It is not to be supposed that the owners and engineer would voluntarily spend their money without the return of a competent gain which being private can hardlye be strecht so farre as the bill would importe to the publique multitude . . . .

He felt that the tripartite division of drowned fenlands "which in sommor ar excellent pasture" would "instead of helping the general pore . . . undo them and make those that ar allreddye ritch farr more ritch."[1] Willoughby's anxieties seem well-founded when considered together with a complaint lodged with Lord Burghley, also in 1597. Ralph Agas, a crown surveyor, deplored the inefficiency rife among his colleagues and warned of "the daungerous abuses in land measure and plattinge to surveigh daiely committed", especially in the fens.[2] One is inclined to speculate about the reliability of many of the allotments made on behalf of undertakers. Finally, while accounting for the income-earning activities of the fenland cottager, (fishing, fowling, and the cutting of marsh grasses for sale as thatch and fuel) Willoughby posed the question

> . . . whether a pore man may not make more commoditie of a fen full of fishe, foule, and reed, rented for little or nothing, then of grounde made pasture and improuved to hye rent, as the chardges of the drayning will require . . . ?[3]

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[1] Historical Manuscripts Commission: Report on the manuscripts of the Earl of Ancaster, preserved at Grimsthorpe (London: Her Majesty's Stationery Office, 1907), pp. 337-38.

[2] Lansdowne MS, 84, f. 69.

[3] HMC Ancaster, p. 338. Lord Willoughby's cogently expressed animadversions to the fen drainage bill may have resulted in its remaining unpassed until 1601. Two bills on the subject needed only the Commons' final approval at the end of the 1597-98 session when the queen had proceedings on them stopped. Sir John Neale was at a loss as to why this was done, but one possibility may be that Essex forwarded Willoughby's criticisms to Elizabeth, while at the same time adding his own substantial backing to them. Neale, Elizabeth I and Her Parliaments, 1584-1601, pp. 363-64.

All of Lord Willoughby's fears and observations were proven to be warranted over the ensuing four decades. Popham's project of 1605 was abandoned within three years,[1] presumably because of his death, but not before it had earned the chief justice the epithet of "covetous bloody Popham"who would "ruin many poor men, by his offer to drain the Fens."[2] The sewers commissioners sporadically attempted to put large drainage projects underway within the Great Level, (including the one involving Sir Clement Edmondes) but met with little success. The first private entrepreneur to approach the government with a truly grandiose reclamation scheme for the Level was Sir Anthony Thomas. In 1619, he and his partner, Sir William Ayloffe, informed the government of "their intentions . . . to drain, in three years, and at their own expense, all the fen lands" in the counties covered by the Great Level. Of course, in reward for carrying out this brash offer at "their own expense", Thomas and Ayloffe demanded a rapacious return of one-half to two-thirds of the privately owned land recovered and a special low rent of 4d. per acre on all crown land recovered.[3] The latter sum stands in marked contrast to the fine of 20s. per acre, levied on behalf of the undertakers by the sewers commissioners against those whose lands had been improved but who nonetheless refused to contract with them.[4]

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[1] Darby, Draining of the Fens, p. 32

[2] CSP-Dom.,1603-10, p. 300.

[3] Ibid.,1619-23, pp. 65, 141.

[4] CSP-Dom., 1619-23, p. 86. It was the inability of Thomas to make good on his promise that moved James, seeking a solution to the problem of the fens, to enter the drainage business himself. supra, p. 169 n. 1.

Sir Anthony Thomas would continue to inflict his own brand of ambition and incompetence upon the fens and their inhabitants for years to come,[1] but after his initial failure his notoriety was eclipsed by that of Cornelius Vermuyden. It is not known exactly when or why Vermuyden first came to England, but by 1621 he had somehow managed to ingratiate himself with the royal family, both father and son. His first work was on the Thames embankment at Dagenham, Essex. He proceeded from there to Hatfield Chase in Yorkshire and thence to the Great Level for which, in 1630, he became chief undertaker, under the sponsorship of Francis Russell, fourth earl of Bedford.[2]

It seems that wherever he went, Vermuyden left in his wake hordes of local citizenry often angered to the point of violence over the fact that he, a foreigner, had in their eyes invaded and disrupted their lives and their lands. In December 1622, the privy council heard complaints from Vermuyden's labourers in Essex that they had not been paid for their work. Vermuyden responded by protesting that he was unable to pay wages because, although he had "performed the greatest part of the said worke according to his agreement", he had not been able to procure moneys owing him from the landowners.[3] Perhaps the truer version of the story came to light in February 1623, when the commissioners of sewers informed the council that the people of Dagenham refused to pay Vermuyden because "by his delays and the want of durability in the work he has accomplished, the land is in worse condition that it was before."[1] A more extreme form of controversy dogged the Dutchman's efforts at Hatfield Chase where, in 1628, there were riots resulting in the death of a man at the hands of Vermuyden's armed workers. Cries of outrage about his presence and its effect on the area were still being voiced in 1635, and he was frequently embroiled in litigation, which on a least one occasion earned him imprisonment.[2]

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[1] Margaret James, Social Problems and Policy During the Puritan Revolution, 1640-1660 (London: Routledge & Kegan Paul, 1966), pp. 92, 126.

[2] Harris, "Vermuyden," pp. 8-10. [3] APC, 1621-23, p. 377.

Caught in the middle, between men like Thomas and Vermuyden and the aggressively isolationist fenlanders, were the sewers commissioners. Towards the end of the second decade of the seventeenth century their role of active involvement in drainage projects was changing to one of supervision, mediation and arbitration. Their main responsibility was to judge the feasibility of drainage propositions submitted by the undertakers, and then to supervise performance according to the provisions of the contract and with due respect for the law. Difficulties often arose due to pressure applied by the crown to sweeten the pot for the undertakers, or at least make their way smoother than it should have been at times. For example, there was the veiled hint in a royal directive of 1630 to the Lincolnshire sewers commissioners, when Charles personally recommended Robert Long, Sir Robert Killigrew and the earl of Lindsey as undertakers, "provided they may have such proportions of land assigned to them as shall be sufficient to defray so great an expense, and recompense them for their risk". With this in mind, the commissioners were "to proceed forthwith to make a contract with them."[1] In 1629, the same commissioners were ordered by the king to hear the proposals of Sir Anthony Thomas and his associates. They were reminded "not to give ear to those who out of a froward and cross nature shall endeavour to retard the conclusion of a general bargain with the undertakers."[2]

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[1] CSP-Dom., 1619-23, p. 486.

[2] Ibid., 1628-29, p. 262; 1635-36, p. 28; 1633-34, pp. 162, 477.

Five years later, presumably upon the conclusion of Thomas' project, Charles felt it necessary to command that the commissioners ensure freedom from hindrance for the undertakers. Apparently, it was anticipated that previous owners of lands awarded to the Thomas group in return for their work would try to obstruct the latter from taking possession.[3] One possible reason for this apprehension on the part of the king could have been his receipt in 1629 of a charge by the sewers commissioners that the tax of 10s. per acre requested by Thomas was "unwarrantable" and "insupportable" by the country.[4] If such a tax was eventually authorized by the commissioners at Charles' insistence, there would have been good cause to expect opposition.

On the whole, it seems that the sewers commissioners strove to maintain their integrity in the face of both government coercion and local antagonism. In 1629, a group of commissioners from Northamptonshire, Huntingdonshire and Cambridgeshire, including Sir Francis Fane and Oliver Cromwell's uncle Sir Oliver, gave a severe answer to a proposition by undertakers that called for a guarantee that they would have certain lands forfeit to them in fee simple. The commissioners rightfully labelled the suggestion as "preposterous" and declared that they only had the right to levy the appropriate rates and nothing more. Sewers commissioners for Suffolk not only responded to a similar overture in like fashion, but went so far as to deny any need for drainage in their area. They explained that the land in question was only inundated for short periods of time, "which overflowing much enricheth these grounds, so that more draining, would be very hurtful to them."[1] Lord Willoughby can be considered an upstanding example of the prosperous landowner of the fens who was also a sewers commissioner. By his own admission, he stood to profit from drainage, but as a commissioner he felt a responsibility to the poor cottager for whom, he argued so eloquently, drainage often spelt disaster.[2]

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[1] CSP-Dom., 1629-31, p. 426.

[2] Ibid., p. 116.

[3] Historical Manuscripts Commission: The Manuscripts of Sir William Fitzherbert, bart., and others (London: Her Majesty's Stationery Office, 1893), p. 244.

[4] CSP-Dom., 1629-31, p. 69.

These and other instances of intervention by the commissions on behalf of the fenlanders testify to the general quality with which they performed the new tasks thrust upon them by their transmutation. However, they could not avoid unpopularity. It was within their jurisdiction and duty to assess rates and levy taxes in support of the detested undertakers. If and when those taxes were not paid, they also possessed and would invoke the power to strip delinquents of their lands permanently.[1] Even the normal process of allocating land contributions as payment for drainage projects made them the targets of invective. Their job, when done properly and within the law, could earn them little affection from the people they were ostensibly helping; if they misused their authority, so much the worse.

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[1] CSP-Dom., 1629-31, p. 111.

[2] HMC Ancaster, pp. 337-38.

A particularly cynical incident of such abuse occurred in 1637 at Boston, Lincolnshire. It appears that the sewers commissioners were party to a conspiracy in which an exorbitant tax was imposed with the expectation that local inhabitants either could not or would not meet the charge. With the king's foreknowledge and assent, lands of citizens who would be dispossessed in the case of non-payment had been marked out and decreed to be forfeit to the undertakers before the tax had even been levied.[2]

Before the undertakers and their great projects had come to the fens, the sewers commissioners were responsible for carrying out the works of drainage themselves. Naturally they were harassed, but most often by the small individual who used litigation as a vent for his anger. The privy council order of 1616 put a damper on this and it seemed that the future would provide smoother sailing for the commissions. This outlook was altered by the gradual development of the fens into a market for large-scale investment. The sewers commissioners came to be regarded by the fenlanders as servants of an evil partnership formed between king and undertaker. Consequently, opposition to them and those they represented became universal and a matter of principle.

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[1] supra, p. 143.

[2] Bridgewater and Ellesmere MSS, 6748/43.

Personages greater than simple, disgruntled cottagers began to rail against the use to which the government was putting the commissions. As previously mentioned, some of the commissioners themselves tried to resist government policy, the brothers Sir Oliver and Henry Cromwell being two noteworthy members of this group.[1] Henry's son Oliver, the future lord protector, also took up the cause of the fenlander, although not without making sure that he was reimbursed for his troubles. In 1632, he agreed to forestall the work of undertakers near Ely by holding them in suit over a five year period so that those using the common land for grazing would not be forced off of it. This was performed at a cost to the graziers of one groat for each cow they had on the common.[2] Cromwell eventually earned the nickname "Lord of the Fens" for his efforts on behalf of their inhabitants, but his attitude was probably fairly typical of that of the region's gentlemen. He was not so much opposed to the government's plans to drain the fens as to its rather unscrupulous lack of regard for the welfare of the fenland people.[3]

Unfortunately for the sewers commissions, their destiny was inextricably tied to that of the drainage projects. In 1532, they had been given stature and power primarily due to a benevolent royal concern for the deteriorated condition of the realm's defences against inundation. Dr. Penry Williams sees the sewers commissions as evidence of the "steady growth of state intervention in national life",[1] and through their association with the drainage projects they came to stand for many of the negative aspects of that intervention. This is not to suggest that the intentions of the Caroline government were strictly ulterior, or that the original function of the sewers commissions had been entirely forgotten. However, by the 1630s they had evolved into one of the many tools in the government's desperate search for extra-parliamentary revenue. That search proved unsuccessful and the royal government collapsed. The Long Parliament, which met in November 1640, assailed past policies and the king's ministers. In the Grand Remonstrance, amongst all the other grievances that were presented to Charles by parliament in November 1641, was the complaint that

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[1] CSP-Dom., 1634-35, p. 398. [2] Ibid., 1631-33, p. 501.

[3] Thomas Carlyle, The Letters and Speeches of Oliver Cromwell (London: Methuen & Co., 1904), 1:87-88.

> Large quantities of common and several grounds hath been taken from the subject by colour of the Statute of Improvement, and by abuse of the Commission of Sewers, without their consent, and against it.[2]

Thus, the sewers commissions became yet another addition to that ever-increasing list of wrongs thought by the populace to constitute the personal rule of Charles I.

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[1] Penry Williams, The Tudor Regime (Oxford: Clarendon Press, 1979), p. 418.

[2] S. R. Gardiner, ed., The Constitutional Documents of the Puritan Revolution, 1625-1660 (Oxford: Clarendon Press, 1906), p. 212.

# WORKS CITED

## I. MANUSCRIPTS

British Library. London.
Lansdowne MS 84, 121.

Folger Library. Washington, D. C.
Folger Library MS, G.b.10. Burton, D.
*Collection of state papers and other materials*.

Henry E. Huntington Library. San Marino, California.
Bridgewater and Ellesmere MSS.

## II. PRIMARY MATERIALS

Public Record Office. London.
*Calendar of the Charter Rolls preserved in the Public Record Office*. 6 vols. London: Her Majesty's Stationery Office, 1903-27.

*Calendar of the Patent Rolls of the Reign of Henry III*. 6 vols. London: Her Majesty's Stationery Office, 1901-13.

*Calendar of the Patent Rolls of the Reign of Edward I*. 4 vols. London: Her Majesty's Stationery Office, 1893-1901.

*Calendar of the Patent Rolls of the Reign of Henry VI*. 6 vols. London: Her Majesty's Stationery Office, 1901-10.

*Calendar of the Patent Rolls of the Reign of Henry VII*. 2 vols. London: Her Majesty's Stationery Office, 1914-16.

*Calendar of State Papers, Domestic series, of the Reigns of Edward VI, Mary, Elizabeth and James I*. Edited by Robert Lemon and Mary Everrett Green. 12 vols. London: Her Majesty's Stationery Office, 1856-72.

*Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*. Edited by J. S. Brewer, J. Gairdner, R. H. Brodie. 36 vols. London: Her Majesty's Stationery Office, 1862-1932.

Historical Manuscripts Commission.

Series 9. *Calendar of the manuscripts of the Most Honourable the Marquis of Salisbury, preserved at Hatfield House, Hertfordshire*. 24 vols. London: Her Majesty's Stationery Office, 1883-.

Series 32. *The manuscripts of Sir William Fitzherbert, bart., and others*. London: Her Majesty's Stationery Office, 1893.

Series 66. *Report on the manuscripts of the Earl of Ancaster, preserved at Grimsthorpe*. London: Her Majesty's Stationery Office, 1907.

Other Primary Works:

*Acts of the Privy Council of England*. Edited by John Roche Dasent. 46 vols. London: Her Majesty's Stationery Office, 1890-1964.

Baildon, William Paley, ed. *Les Reportes del Cases in Camera Stellata, 1593 to 1609*. Privately printed from the John Hawarde MSS, London: 1894.

Burrell, Andrewes. *A Briefe Relation . . .* . London: Francis Constable, 1642.

________. *Exceptions Against Sir Cornelius Virmuden's Discourse for the Draining of the Great Fens . . .* . London: Robert Constable, 1642.

*Calendar of Letters, Despatches, and State Papers, relating to the negotiations between England and Spain . . .* . Edited by G. A. Bergenroth, Pascual de Gayangos, *et al*. 15 vols. London: Longman's & Co., 1862-1954.

Callis, Robert. *The Reading of . . . upon the Statute . . . of Sewers*. 2nd ed. London: Thomas Bassett, 1685.

Camden, William. *Britannia*. London: Edmund Gibson, 1695.

Clark, Andrew, ed. *'Brief Lives' . . . by John Aubrey*. Oxford: Clarendon Press, 1898.

Coke, Edward. *The Fourth Part of the Laws of England Concerning the Jurisdiction of Courts*. 4th ed. London: A. Crooke *et al*., 1669.

Cooper, J. P. and Thirsk, Joan, eds. *Seventeenth-Century Economic Documents*. Oxford: Clarendon Press, 1972.

Dalton, Michael. The Countrey Justice. London: 1619; reprint ed., London: Professional Books Limited, 1973.

Defoe, Daniel. A Tour Thro' the Whole Island of Great Britain . . . . 2 vols. London: Frank Cass & Co., 1968.

D'Ewes, Sir Simonds, ed. The Journals of All the Parliaments during the Reign of Queen Elizabeth. London: 1682; reprint ed., Shannon, Ire.: Irish University Press, 1973.

Dugdale, William. The History of Imbanking and Drayning of Divers Fenns and Marshes . . . . London: Alice Warren, 1662.

The English Reports. Vol. 72: King's Bench Division 1 containing Bellewe; Keilwey; and Moore. Edinburgh: William Green & Sons, 1907.

______. Vol. 77: King's Bench Division 6 containing Coke, Parts 5 to 13. Edinburgh: William Green & Sons, 1907.

______. Vol. 79: King's Bench Division 8 containing Croke, Jac.; Croke, Car.; and Popham. Edinburgh: William Green & Sons, 1907.

Fisher, H. E. S. and Jurica, A. R. J., eds. Documents in English Economic History. Vol. 1: England from 1000 to 1760. London: G. Bell and Sons, 1972.

Fitzherbert, Sir Anthony. The New Natura Brevium. 9th ed. Dublin: H. Watts, 1793.

Gardiner, Samuel Rawson, ed. The Constitutional Documents of the Puritan Revolution, 1625-1660. Oxford: Clarendon Press, 1906.

Groombridge, Margaret J., ed. Calendar of Chester City Council Minutes, 1603-1642. Record Society of Lancashire and Cheshire: 1956.

Hall, Edward. Chronicle. 1809 ed. New York: AMS Press, 1965.

Hughes, P. L. and Larkin, J. F., eds. Tudor Royal Proclamations. 3 vols. New Haven, Conn.: Yale University Press, 1964.

Jacob, Giles. A New Law Dictionary. London: 1724.

Journals of the House of Commons. Vol. 1. London: 1803.

Kirkus, Mary, ed. The Records of the Commissioners of Sewers in the Parts of Holland, 1547-1603, Vol. 1. Lincoln Record Society: 1959.

Lambarde, William. *Eirenarcha*. London: 1581; reprint ed., London: Professional Books Limited, 1972.

Lamond, Elizabeth, ed. *A Discourse of the Common Weal of this Realm of England*. Cambridge: Univeristy Press, 1954.

*Les Termes de la Ley*. London: 1721 ed.

Lister, John, ed. *West Riding Sessions Records, Vol. 2*. Yorkshire Archaeological Society: 1915.

McClure, N. E., ed. *The Letters of John Chamberlain*. 2 vols. Philadelphia: American Philosophical Society, 1939.

Moore, Sir Jonas. *The History or Narrative of the Great Level of the Fenns Called Bedford Level*. London: Moses Pitt, 1685.

Owen, A. E. B., ed. *The Records of the Commissioners of Sewers in the Parts of Holland, 1547-1603, Vols. 2 and 3*. Lincoln Record Society: 1968, 1977.

Sainty, J. C., ed. *Further Materials From an Unpublished Manuscript of the Lords Journals for Sessions 1559 and 1597 to 1598*. London: House of Lords Record Office, 1965.

Sanders, G. W. *Orders of the High Court of Chancery*. 1 vol.-2 pts. London: 1845.

Sorben, Robert P., ed. *The Diary of John Manningham*. Hanover, N. H.: The University Press of New England, 1976.

*State Papers published under the authority of His Majesty's [George IV] Commission, King Henry the Eighth*. 5 vols. London: 1830-1836.

*Statutes of the Realm*. Edited by T. E. Tomlins *et al*. 9 vols. London: Dawson's, 1810-22.

## III. SECONDARY MATERIALS

Barnes, T. G. *The Clerk of the Peace in Caroline Somerset*. Leicester: University Press, 1961.

________. *Somerset, 1625-1640: A County's Government During the "Personal Rule"*. Cambridge, Mass.: Harvard University Press, 1961.

Black, Henry Campbell. *Black's Law Dictionary*. rev. 4th ed. St. Paul, Minn.: West Publishing Co., 1968.

Blackstone, Sir William. *Commentaries on the Laws of England*. Edited by Sir Joseph Chitty. 4 vols. London: William Walker, 1826.

Bush, M. L. *The Government Policy of Protector Somerset*. Montreal: McGill-Queen's University Press, 1975.

Carlyle, Thomas. *The Letters and Speeches of Oliver Cromwell*. 3 vols. London: Methuen & Co., 1904.

Chalklin, C. W. "Navigation Schemes on the Upper Medway, 1600-1665." *Journal of Transport History* 5(1961):105-15.

Cheney, C. R., ed. *Handbook of Dates for Students of English History*. London: Royal Historical Society, 1945.

Chrimes, S. B. *English Constitutional Ideas in the Fifteenth Century*. Cambridge: University Press, 1936.

Clapham, J. H. Review of *Public Works in Medieval Law*, by C. T. Flower. *English Historical Review* 33(1918):105-7.

Clark, Peter. *English Provincial Society from the Reformation to the Revolution: Religion, Politics and Society in Kent 1500-1640*. Sussex: The Harvester Press, 1977.

Cockburn, J. S. *The History of English Assizes*. Cambridge: University Press, 1972.

Cokayne, George E. *The Complete Peerage*. Edited by Geoffrey White. 13 vols. London: The St. Catherine Press, 1959.

Darby, H. C. *The Draining of the Fens*. 2nd ed. Cambridge: University Press, 1956.

________. *The Medieval Fenland*. Cambridge: University Press, 1940.

Dawson, John P. *A History of Lay Judges*. Cambridge, Mass.: Harvard University Press, 1960.

*Dictionary of National Biography*. Edited by Leslie Stephens and Sidney Lee. 22 vols. London: Smith, Elder, & Co., 1908-9.

Elton, G. R. "The Commons' Supplication of 1532: Parliamentary Manoeuvres in the Reign of Henry VIII." *English Historical Review* 66(1951):507-34.

________. *England Under the Tudors*. 2nd ed. London: Methuen & Co., 1974.

Elton, G. R. "The Evolution of a Reformation Statute." *English Historical Review* 64(1949):174-97.

———. "Henry VIII's Act of Proclamations." *English Historical Review* 75(1960):208-22.

———. *Policy and Police*. Cambridge: University Press, 1972.

———. "Reform and the 'Commonwealth-Men' of Edward VI's Reign." *The English Commonwealth, 1547-1640*. Edited by Peter Clark, A. G. R. Smith, and Nicholas Tyacke. Leicester: University Press, 1979.

———. *Reform and Reformation: England, 1509-1558*. London: Edward Arnold, 1977.

———. *Reform and Renewal: Thomas Cromwell and the Common Weal*. Cambridge: University Press, 1973.

———. *The Tudor Constitution*. Cambridge: University Press, 1972.

———. *The Tudor Revolution in Government*. Cambridge: University Press, 1953.

Evans, John H. "Archaeological Horizons in the North Kent Marshes." *Archaeologia Cantiana* 66(1954):103-46.

Gleason, J. H. *The Justices of the Peace in England, 1558 to 1640*. Oxford: Clarendon Press, 1969.

Gray, H. L. *The Influence of the Commons on Early Legislation*. Cambridge, Mass.: Harvard University Press, 1932.

Hale, Sir Matthew. *The Prerogatives of the King*. Edited by D. E. C. Yale. London: Selden Society, 1976.

Harris, L. E. "Sir Cornelius Vermuyden, An Evaluation and An Appreciation." *Newcomen Society Transactions* 27(1949-51): 7-18.

Harriss, G. L. "Medieval Government and Statecraft." *Past and Present* 25(1963):8-35.

Hassell Smith, A. *County and Court: Government and Politics in Norfolk, 1558-1603*. Oxford: Clarendon Press, 1974.

Heinze, R. W. *The Proclamations of the Tudor Kings*. Cambridge: University Press, 1976.

Henderson, Edith. *Foundations of English Administrative Law*. Cambridge, Mass.: Harvard University Press, 1963.

Hill, J. W. F. Tudor and Stuart Lincoln. Cambridge: University Press, 1956.

Hinton, R. W. K. "The Decline of Parliamentary Government under Elizabeth I and the Early Stuarts." Cambridge Historical Journal 13(1957):116-32.

_______. "English Constitutional Theories from Sir John Fortescue to Sir John Eliot." English Historical Review 75(1960): 410-25.

Holdsworth, William S. A History of English Law. 16 vols. London: Methuen & Co., 1903-66.

Hughes, Thomas Cann. "The Dee Mills and the 'Miller of the Dee'." Bygone Cheshire. Edited by William Andrews. Chester: Phillipson and Golder, 1895.

Jacob, E. F. The Fifteenth Century, 1399-1485. Oxford: Clarendon Press, 1961.

Jaffe, Louis and Henderson, Edith. "Judicial Review and the Rule of Law: Historical Origins." Law Quarterly Review 72(1956): 345-64.

James, Margaret. Social Problems and Policy During the Puritan Revolution, 1640-1660. London: Routledge & Kegan Paul, 1966.

Jones, Gareth. History of the Law of Charity, 1532-1827. Cambridge: University Press, 1969.

Jones, W. J. The Elizabethan Court of Chancery. Oxford: Clarendon Press, 1967.

_______. "The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period." Transactions of the American Philosophical Society 69-pt. 3 (July, 1979).

_______. Politics and the Bench: The Judges and the Origins of the English Civil War. London: George Allen and Unwin, 1971.

Knafla, Louis A. Law and Politics in Jacobean England. Cambridge: University Press, 1977.

Lamb, H. H. The English Climate. London: English Universities Press, 1964.

Langan, P. St. John, ed. Maxwell on the Interpretation of Statutes. 12th ed. London: Sweet and Maxwell, 1969.

Lehmberg, S. E. The Reformation Parliament. Cambridge: University Press, 1970.

Livett, Grevile Mairis. "Lydd Church." Archaeologia Cantiana 42 (1930):61-92.

Merriman, R. B. *Life and Letters of Thomas Cromwell*. 2 vols. Oxford: Clarendon Press, 1902.

Neale, J. E. *Elizabeth I and Her Parliaments, 1559-1581*. London: Jonathan Cape, 1953.

________. *Elizabeth I and Her Parliaments, 1584-1601*. London: Jonathan Cape, 1957.

Nichols, John. *The Progresses, Processions, and Magnificent Festivities of King James the First*. 4 vols. New York: Burt Franklin, 1828.

Notestein, Wallace. *The House of Commons, 1604-1610*. New Haven, Conn.: Yale University Press, 1971.

Plucknett, T. F. T. *Statutes and their Interpretation in the First Half of the Fourteenth Century*. Cambridge: University Press, 1922.

Pollard, A. F. *The Evolution of Parliament*. London: Longmans, Green & Co., 1920.

Powell, W. R., ed. *The Victoria History of the Counties of England: A History of the County of Essex*. 7 vols. London: Institute of Historical Research, 1960.

Powicke, Sir F. Maurice, and Fryde, E. B., eds. *Handbook of British Chronology*. 2nd ed. London: Royal Historical Society, 1961.

Prest, Wilfrid. *The Inns of Court under Elizabeth I and the Early Stuarts*. New Jersey: Rowman and Littlefield, 1972.

Rex, Millicent Barton. *University Representation in England, 1604-1690*. London: George Allen & Unwin, 1954.

Richardson, H. G. "The Early History of Commissions of Sewers." *English Historical Review* 34(1919):385-93.

Roskell, J. S. "The Office and Dignity of Protector of England." *English Historical Review* 68(1953):193-233.

________. "Perspectives in English Parliamentary History." *Historical Studies of the English Parliament*. Edited by E. B. Fryde and Edward Miller. 2 vols. Cambridge: University Press, 1970. 2:296-323.

Rubinstein, Amnon. *Jurisdiction and Illegality*. Oxford: Clarendon Press, 1965.

Russell, Conrad. *Parliaments and English Politics, 1621-1629*. Oxford: Clarendon Press, 1979.

Spedding, James. *The Letters and Life of Sir Francis Bacon*. 7 vols. London: Longmans, Green, Reader, and Dyer, 1861-74.

Theobald, J. Anwyl, ed. *On the Interpretation of Statutes by Sir Peter Maxwell*. 4th ed. Toronto: The Carswell Co., 1905.

Thirsk, Joan. *Fenland Farming in the Sixteenth Century*. Leicester: University College, 1953.

Vinogradoff, Sir Paul, ed. *Oxford Studies in Social and Legal History*. 9 vols. Oxford: Clarendon Press, 1909-27. Vol. 8: *Studies in the Period of Baronial Reform and Rebellion, 1258-1267* by E. F. Jacob.

Webb, Sidney, and Webb, Beatrice. *English Local Government*. Vol. 4: *Statutory Authorities for Special Purposes*. London: Frank Cass & Co., 1922.

Wilkinson, B. *Constitutional History of England in the Fifteenth Century, (1399-1485)*. London: Longmans, Green & Co., 1964.

Willan, T. S. *River Navigation in England 1600-1750*. London: Frank Cass & Co., 1964.

Williams, Penry. *The Tudor Regime*. Oxford: Clarendon Press, 1979.

Woolrych, Humphrey. *A Treatise of the Law of Waters*. London: William Benning & Co., 1851.